No. 18-9273

IN THE
Supreme Court of the United States

BILLY JOE WARDLOW,
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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the lower court err in applying a procedural bar based on the finding by the Texas Court of Criminal Appeals (CCA) that Wardlow waived his state habeas proceedings, when this Court has held that discretionary state procedural bars are adequate and independent grounds to bar federal habeas relief?

2. Did the Fifth Circuit err in applying the presumption of correctness under 28 U.S.C. § 2254(e)(1) to the state court fact-findings, where the CCA dismissed the application on procedural grounds, thus leaving the trial court's fact-findings undisturbed?

3. Is certiorari review of the merits of Wardlow's underlying habeas claims warranted if reasonable jurists would not debate the district court's holding that, under the deferential lens of § 2254(e)(1), his substantive claims lack any merit?

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BRIEF IN OPPOSITION

Petitioner Billy Joe Wardlow is a Texas inmate sentenced to death for the murder of eighty-two-year-old Carl Cole during a robbery. During state habeas review, Wardlow repeatedly changed his mind about whether to pursue habeas relief. Ultimately, he informed the CCA that he wanted to waive habeas review, and the CCA entered an order granting his request. Nonetheless, his appointed habeas attorney filed an application raising seven grounds for relief. The application included a statement from Wardlow admitting his prior waiver but claiming that he had again changed his mind and desired to pursue relief. The trial court accepted the filing and entered findings and conclusions rejecting the application on the merits. However, the CCA dismissed the application, holding that Wardlow waived habeas relief. In federal court, Wardlow raised the same claims he raised in his habeas application. The district court determined that the claims are procedurally defaulted based on the CCA's order and alternatively found the claims to lack merit. The Fifth Circuit then denied Wardlow a certificate of appealability (COA), holding that neither the district court's finding of procedural default nor its resolution of the merits was debatable.

Wardlow now petitions this Court for a writ of certiorari from the Fifth Circuit's denial of COA, complaining primarily that the Fifth Circuit erred in its procedural determinations, but also that it erred in denying COA on the three substantive claims: 1) ineffective-assistance-of-trial-counsel (IATC) for failure to object to medical examiner testimony regarding the distance from which the gun was fired; 2) the State substantially interfered with his co-defendant's decision not to testify; and 3) IATC for

failure to investigate and present mitigation evidence. But Wardlow fails to identify any compelling reasons for this Court to review the decision of the court below. Notably, the Fifth Circuit did not err in finding that Wardlow's claims were undebatably procedurally defaulted as a result of his waiver. Nor did the Fifth Circuit err in finding that the district court's resolution of his substantive claims—with appropriate deference afforded to fact-findings that were not inconsistent with or directly contradicting the CCA's ultimate dismissal—was not debatable. Thus, this Court should deny Wardlow's petition.

STATEMENT OF THE CASE

I. Facts of the Crime

The Fifth Circuit summarized the facts of Wardlow's capital murder as follows:

> Wardlow shot and killed Carl Cole while committing a robbery at Cole's home in the small east Texas town of Cason. When he was in jail awaiting trial, Wardlow wrote a confession to the sheriff investigating the murder. The State relied on that letter to prove the intent element required for a capital murder conviction. The letter stated that Wardlaw went to Cole's house, intending to steal a truck. Once inside the house, Wardlow said that he pulled a gun on Cole. Wardlow added:
>
> > Being younger and stronger, I just pushed him off and shot him right between the eyes. Just because he pissed me off. He was shot like an executioner would have done it. He fell to the ground lifeless and didn't even wiggle a hair.
>
> Wardlow testified and confirmed he killed Cole but gave a different reason for doing so. He told the jury that he did not intend to kill Cole when he went to his house; instead, he and his girlfriend Tonya Fulfer only intended to rob Cole and steal his truck. When Wardlow brought out the gun and told Cole to go back inside the house, Cole lunged at Wardlow and grabbed his arm and the gun, attempting to push Wardlow away. Wardlow testified that Cole was stronger than he expected, so he was caught off balance and began falling backwards. Wardlow said he shot the gun without aiming, hoping it would get Cole off him. The bullet hit Cole right between the eyes.

> The state countered Wardlow's claim about his intent by noting inconsistencies in his story and testimony from a medical examiner inconsistent with the gunshot occurring during a struggle.

Pet'r App. (App.) 1 at 2; *Wardlow v. Davis*, 750 F. App'x 374, 375 (5th Cir. 2018) (unpublished).

II. Evidence Relating to Punishment

A. The State's case

Deputy Barnard testified that while on patrol on January 11, 1993, he observed Wardlow driving at a high rate of speed and attempted to pull him over. ROA.6647.[1] Wardlow refused to pull over, and Deputy Barnard was forced to pursue him. ROA.6648. Deputy Barnard followed Wardlow for several miles, but Wardlow continued traveling at over 100 miles per hour on the highway and 70 miles per hour on a narrow county road. ROA.6648–49, 6655–56. Wardlow was arrested for fleeing. ROA.6656–58.

John Schultz, a salesman at a used car lot in Fort Worth, testified that on June 5, 1993, Wardlow, accompanied by a woman, took a 1989 Chevrolet pickup for a test drive and never brought it back. ROA.6659–68.

Morris County jailer J.P. Cobb testified that on February 20, 1994, while Wardlow was incarcerated awaiting trial, jailers found a two-foot metal bar with a six- or eight-inch rod extending from the middle behind Wardlow's bunk in the cell he shared with three other inmates. ROA.6769–70. One of Wardlow's former cellmates testified that Wardlow had planned to use the metal bar to hit one of the jailers in the head, take

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[1] "ROA" refers to the record on appeal filed in the court below.

his keys, and escape. ROA.6773–75. The State also offered into evidence several letters Wardlow wrote while he was incarcerated in Morris County Jail, in which he threatened to harm other inmates, jailers, and the sheriff. ROA.6801–04.

Deputy Sheriff Warren Minor testified that while being transported from the Titus County Jail to the courtroom the second day of trial, Wardlow stated the jail was using trustees as guards, and "if they don't stop using them I am going to double my time on one of them." ROA.6805–06.

Harry Washington, an undercover narcotics agent, testified that on September 9, 1992, he and an informant approached Wardlow attempting to buy some marijuana from him. ROA.6843–44. Wardlow told Washington that he did not mess with drugs. ROA.6844. When Washington inquired about a .45 handgun he observed lying on the seat next to Wardlow in the pickup, Wardlow laid his hand on top of the gun and responded, "I'll shoot you with it." ROA.6845.

Royce Smithey, an investigator with the unit that prosecutes felony offenses occurring within the Texas prison system, testified regarding the various levels of security within the prison system. ROA.6850–51, 6855. He told the jury that, while capital murder defendants who receive a death sentence are segregated from general population and are strictly monitored with limited access to prison employees, capital defendants who receive a life sentence go into the general population and are initially classified no differently than any other felony offender. ROA.6856–57, 6860–62. Smithey testified that violent crimes, which sometimes involve prison employees, occur

often within the Texas prison system, and the incidence of such crimes is much greater in the general population than on death row. ROA.6857–62.

B. The defense's mitigation case

Amy Billingslea, Wardlow's former church youth minister, testified that she had known Wardlow since he was a baby and had worked with him when he became involved in the church youth group as a teenager. ROA.6895–96. She described Wardlow as quiet, well mannered, hard-working, bright, and respectful. ROA.6897–98. He played on the church basketball team and participated in church fundraisers. ROA.6896. Although Wardlow attended church regularly during his early teens, he quit attending several years prior to the murder. ROA.6897, 6900.

Glendon Gillean, a librarian at Daingerfield High School, testified that as a student, Wardlow would often come to the library before school and during lunch to work on educational computer programs and volunteered to help pack and move books when the library was relocated. ROA.6902–04. Wardlow regularly checked out books on topics such as mechanics, technology, and aeronautics. ROA.6904. Wardlow never created a disciplinary problem for Gillean. ROA.6905. Assistant Principal Gerald Singleton testified that Wardlow had attended school regularly and had never had any disciplinary procedures lodged against him. ROA.6906–07. But Wardlow had quit school before completing his junior year. ROA.6908.

III. Course of State and Federal Proceedings

Wardlow was convicted and sentenced to death in 1995 for capital murder. ROA.1091–94. Wardlow's conviction was affirmed on direct review to the CCA.

ROA.817–37. That same year, the state trial court conducted a hearing to determine whether Wardlow desired the appointment of counsel for filing a state application for writ of habeas corpus. ROA.313. Wardlow appeared at this hearing in person and, through counsel, indicated that he did not desire to have counsel appointed and did not wish to pursue any further appeals. *Id*. The trial court found that Wardlow was mentally competent, had voluntarily and intelligently waived his right to have counsel appointed, and waived his right to proceed pro se in open court. *Id*. The trial court signed the findings memorializing the hearing and forwarded them to the CCA. *Id*.

Wardlow subsequently "entered into a legal representation agreement with attorney Mandy Welch . . . in which she agreed to notify the appropriate courts that [Wardlow] did, in fact, wish to pursue his post-conviction remedies." ROA.115. The trial court then entered supplemental findings confirming Wardlow's wish to pursue habeas relief, and the CCA appointed Welch to represent Wardlow and ordered that his state habeas application be filed within 180 days. ROA.315, 317.

Eighteen days before Wardlow's filing deadline, Wardlow another letter to the CCA again expressing a desire "to waive and forego all further appeals." ROA.106. The CCA granted Wardlow's request to abandon further appeals, based on the trial court's prior hearing. ROA.108. Despite this order, Welch filed a state habeas application in the trial court on the 180th day after her appointment. ROA.7372. At the same time, Welch also filed a statement from Wardlow, authorizing her to file the application and asking the court to proceed with consideration of his application. ROA.7439–41.

The state trial court issued findings of fact and conclusions of law, recommending denial of habeas relief, which were forwarded to the CCA. ROA.7338–55. However, the CCA dismissed Wardlow's application, declining to review the merits of his claims based on its prior order granting Wardlow's request to abandon further appeals. App. 5 at 1; *Ex parte Wardlow*, No. WR-58,548-01, 2004 WL 7330934 (Tex. Crim. App. 2004). The CCA denied Wardlow's motion for rehearing. ROA.7366.

Wardlow then filed a petition for habeas relief in federal district court. ROA.9–211. The Director filed an answer, ROA.241–311, and Wardlow sought an evidentiary hearing, which was denied. ROA.528–45. Thereafter, the case went dormant until 2016, when the parties agreed that, because of changes to the law, supplemental briefing was necessary. ROA.553–56. Both parties then filed supplemental briefing, and the district court ultimately denied relief. App. 3 at 1. The Fifth Circuit then denied Wardlow's application for COA. App. 1 at 1.

REASONS FOR DENYING THE PETITION

I. Wardlow Provides No Compelling Reason to Expend Limited Judicial Resources on This Case.

The questions Wardlow presents for review are unworthy of the Court's attention. Wardlow has failed to provide a single "compelling reason" to grant review. Indeed, no conflict among the circuits has been supplied, no important issue proposed, nor has a similar pending case been identified to justify this Court's discretionary review. Wardlow contends that the Fifth Circuit paid only "lip service" to the COA standard when it determined that his claims were undebatably procedurally barred by the CCA's dismissal of his state habeas application and that his claims were alternatively without

merit. But Wardlow's complaint about the Fifth Circuit's COA analysis is no more than mere disagreement with its outcome. This is, at best, simply a request for error correction, and this Court's limited resources would be better spent elsewhere. *See* Sup. Ct. R. 10 ("A petition for writ of certiorari is rarely granted when the asserted error consists of . . . misapplication of a properly stated rule of law."); *Citibank, N.A. v. Wells Fargo Asia Ltd.*, 495 U.S. 660, 674 (1990) (Rehnquist, C.J., concurring) (questioning why certiorari was granted when the opinion decided "no novel or undecided question of federal law" and merely "recanvasse[d] the same material already canvassed by the Court of Appeals").

Even more importantly, however, the Fifth Circuit did not err. Indeed, the district court's procedural ruling is not debatable because Wardlow failed to show that the waiver rule applied by the CCA falls within the small category of cases deemed inadequate procedural grounds. This was a discretionary procedural ruling, which this Court has sanctioned. Further, Wardlow cites to no precedent demonstrating that, in these circumstances, it was inappropriate for the federal district court to defer to the state court findings. Finally, as for the merits, Wardlow merely disagrees with the district court's and Fifth Circuit's application of the correct law to the facts, which is insufficient to merit certiorari review. Respondent therefore respectfully suggests that certiorari be denied.

II. The Fifth Circuit Did Not Violate the COA-Threshold-Review Standard.

As an initial matter, Wardlow complains that the Fifth Circuit improperly applied the COA standard in denying his claims on both procedural and substantive

grounds. Petition at 17, 20–35. Wardlow asserts that the Fifth Circuit has in the past misapplied the COA standard, and that, although it "paid lip service" to the COA standard in Wardlow's case, it only reached its conclusion to deny COA after fully rejecting Wardlow's arguments. *Id*. at 15–17. Wardlow is incorrect.

To obtain a COA on procedurally-defaulted claims, a petitioner must show 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). Wardlow raised five issues in his application for COA. *See* App. 1 at 1. Despite this, and as Wardlow himself noted, *see* Petition at 7, the Fifth Circuit's entire opinion was a mere four pages and its discussion of the claims only half that. *See* App. 1 at 1–4. Indeed, Wardlow points out that the Fifth Circuit's determination on the merits of his claims amounted to the following plain statements:

> That deference to the state court factfinding that our caselaw and AEDPA[2] requires is a big part of why Wardlow cannot meet the COA threshold on his substantive claims. Essentially for the reasons the district court provided when analyzing the merits of Wardlow's claims under that deferential lens, we do not find debatable its resolution of the three substantive claims Wardlow seeks to appeal.

App. 1 at 4. It can hardly be said that the Fifth Circuit's decision was a full, complete, or probing analysis on the merits of his claims or on the antecedent procedural determinations. Rather, this was an appropriate COA finding and it was based on an appropriately limited threshold inquiry. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

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[2] The Anti-Effective Death Penalty Act.

Wardlow's complaint is a textbook example of a purported "misapplication of a properly stated rule of law," Sup. Cr. R. 10, and for the reasons discussed above, is thus not compelling. His request for a writ of certiorari on this point ought to be denied.

III. The Fifth Circuit Correctly Found the District Court's Procedural Ruling Not Debatable.

Wardlow first argues that the lower court erred in finding his claims to be procedurally barred because the CCA's dismissal of his state habeas application was not based on an adequate and independent state procedural rule. Petition at 9–12. He complains that the Fifth Circuit did not ask whether the waiver rule applied by the CCA existed and whether it was firmly established and regularly followed. Wardlow states: "Had it done so, the Fifth Circuit would have found that the CCA cited no rule of procedure violated by Mr. Wardlow when it dismissed his habeas application in 2004." *Id.* at 10. Wardlow argues that the Fifth Circuit's holding on the procedural ruling is at least debatable among jurists of reason. But Wardlow is not correct because his argument is based on a misinterpretation of the relevant case law.

"A federal habeas court will not review a claim rejected by a state court 'if the decision of [the state] court rests on a state law ground that is independent of the federal question and adequate to support the judgment.'" *Beard v. Kindler*, 558 U.S. 53, 55 (2009) (quoting *Coleman v. Thompson*, 501 U.S. 722, 729 (1991)). Federal review is precluded "whether the state law ground is substantive or procedural." *Coleman*, 501 U.S. at 729. When a petitioner fails to properly raise a claim in state court, he "has deprived the state courts of an opportunity to address those claims in the first instance." *Id*. at 732. Accordingly, preventing review of claims decided on state grounds "ensures

that the States' interest in correcting their own mistakes is respected in all federal cases." *Id.*

A state-law procedural bar is adequate to preclude federal consideration if it is "'firmly established and regularly followed.'" *Kemna*, 534 U.S. at 376 (quoting *James v. Kentucky*, 466 U.S. 341, 348 (1984)). The discretionary nature of such a bar does not make it any less "adequate," for a "discretionary rule can be 'firmly established' and 'regularly followed' even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not others." *Beard*, 558 U.S. at 60–61. This Court reasoned that inflexible or mandatory rules posed particular problems for state courts because the factors facing state courts "'are so numerous, variable and subtle that the fashioning of rigid rules would be more likely to impair [a state court's] ability to deal fairly with a particular problem than to lead to a just result.'" *Id.* at 61 (quoting *United States v. McCoy*, 517 F.2d 41, 44 (7th Cir. 1975)). The Court considered its holding to be "so uncontroversial, in fact, that both parties agreed to the point before this Court." *Id.* at 62.

Beard forecloses Wardlow's claim. The petitioner in *Beard* contended that the state court erred in applying a new rule, not a discretionary rule. *Id.* Here, Wardlow initially expressed his desire to forego state habeas proceedings, and after a hearing on the matter, the state trial court found that he had voluntarily and intelligently waived his appeals. ROA.313. When Wardlow had a change of heart, the CCA granted the appointment of counsel along with 180 days to file the application. ROA.115, 315, 317. Despite this, Wardlow had another change of heart and again expressed his desire to

waive state habeas proceedings. ROA.106. The CCA then entered an order granting Wardlow's request to waive further proceedings. ROA.108. Ignoring the CCA's order, Wardlow filed a state habeas application in the trial court and a statement authorizing the filing of his application on the 180th day. ROA.7372, 7439–41. Although the state trial court issued findings with respect to each of the claims raised in the application, the CCA, pointing to its previous order accepting Wardlow's waiver, dismissed the writ. ROA.7338–55, 7360. That the CCA chose to accept and enforce the waiver in this instance, and thereby apply a procedural bar, exemplifies the discretionary rule the *Beard* Court sanctioned.

Wardlow claims that the Fifth Circuit did not ask whether such a waiver rule exists in Texas and that the CCA has never "clearly announced" the rule in question. Petition at 10, 12. But this assertion is incorrect, as evidenced by the lower court's reference to the holding in *Ex parte Reedy*, in which the CCA has held that an express waiver of postconviction review is enforceable where it is "knowingly and intelligently executed." App. 1 at 3 (quoting *Ex parte Reedy*, 282 S.W.3d 492, 494–96 (Tex. Crim. App. 2009) ("[N]ot only is the writ subject to being expressly waived, it may even be forfeited (that is to say, lost by mere inaction) under certain circumstances.")); *see also Ex parte Insall*, 224 S.W.3d 213, 214–15 (Tex. Crim. App. 2007). And the Fifth Circuit *did* consider Wardlow's argument that the CCA's bar was an "ad hoc" ruling, finding that it was not a "debatable critique of the district court's ruling." App. 1 at 3.

Further, Wardlow argues that the CCA's order "did not erect a barrier to Wardlow's filing a habeas application—it merely permitted him not to file an

application. It was thus not an order that had to be withdrawn to enable Wardlow to file his habeas application." Petition at 10–11. But this is a mischaracterization of the CCA's order. The CCA's order granted Wardlow's request to waive any and all appeals; the CCA *did not* say Wardlow was permitted not to file an application. ROA.108. It was an affirmative, not simply a permissive, order. Thus, an order was in place, supporting the Fifth Circuit's holding that Wardlow should have sought to rescind the order if waiver was not his intention. App. 1 at 3.

Wardlow primarily relies on *Ex parte Reynoso*, 257 S.W.3d 715 (Tex. Crim. App. 2008), in his attempts to undermine the significance of the CCA's order. As the Fifth Circuit pointed out, in *Reynoso* the CCA stated in dicta that because a habeas applicant can "waffle" in his decision to file an application, a waiver is not truly effective until the date to file the application has passed. App. 1 at 3–4 (citing *Reynoso*, 257 S.W.3d at 720 n.2). Thus, the Fifth Circuit noted, in finding that a waiver is not *truly* effective, *Reynoso* recognized "only that an applicant can withdraw his waiver up until the deadline," which Wardlow failed to do when he did not ask the CCA to revoke its order accepting his waiver. *Id*. at 4. According to the Fifth Circuit,

> [t]hat is the only way to read [the footnote] consistently with the discussion later in the same footnote that a waiver can relieve a court of the need to appoint habeas counsel (if a court could only enter a waiver finding the day the application is due, an attorney would have to work up to that point).

Id. (citing *Reynoso*, 257 S.W.3d at 720 n.2). Moreover, despite Wardlow's insistence that neither *Reynoso* nor any other Texas law requires an applicant to rescind a waiver before the application due date, Wardlow disregards Reynoso's case history. First, in *Reynoso*, the CCA issued no order accepting a waiver by Reynoso, unlike the instant case. Second,

although Reynoso changed his mind several times, his vacillation was accompanied each time by action taken by the trial court—twice via a hearing and often at the direction of the CCA—that led to the trial court withdrawing or re-appointing habeas counsel. 257 S.W.3d at 717–19. In fact, in discussing the case history, the CCA specifically stated that it had held that the trial court's action in re-appointing habeas counsel "would be treated as a rescission." *Id.* at 718. Therefore, the CCA considered the actions of *both* Reynoso and the trial court *before the filing deadline* to amount to a rescission of a prior order. That did not transpire in the instant case. Indeed, as shown above, Welch submitted Wardlow's application and his statement requesting to proceed the very last day of the filing deadline, thereby failing to give either the trial court or CCA any notice of his intention even though a waiver order was still in place. And the language utilized in *Reynoso* contradicts Wardlow's implied assertion that the CCA does not need some form of express rescission of a waiver prior to the filing deadline. Finally, the primary issue in *Reynoso* concerned whether Reynoso's habeas application was timely filed and the effect of his vacillation on the timeliness issue, not whether he waived habeas review altogether. *Id.* at 719–22.

Ultimately, *Reynoso* provides no clear rule of law applicable to Wardlow's specific circumstances. The statement in dicta that "a waiver is not truly effective until the date to file the application has passed" fails to address what constitutes a rescission of a waiver when an order granting a waiver is already entered. In other words, Wardlow simply assumes that the filing of his application and his statement on the day such were due was sufficient to revoke his waiver, although *Reynoso* (1) does not specifically

address this matter and (2) indicates the opposite given the CCA's discussion of the case history. Wardlow, moreover, did not ask the CCA reconsider its decision to accept his waiver; he simply proceeded as if the order did not exist.

At any rate, any ambiguity in applying *Reynoso* to Wardlow's facts only lends credence to the CCA applying a discretionary procedural bar per *Beard*: that the CCA may have allowed petitioners in other cases to rescind a waiver—under different circumstances—does not undermine the adequacy of the procedural default in Wardlow's case. *See Amos v. Scott*, 61 F.3d. 333, 342 (5th Cir. 1995) ("We acknowledge with approval the principle that an occasional act of grace by a state court in excusing or disregarding a state procedural rule does not render the rule inadequate; after all, 'regularly' is not synonymous with 'always' and 'strictly' is not synonymous with 'unanimously.'"). The Fifth Circuit thus appropriately held that, because Wardlow identified no case where the CCA issued a waiver and later ignored it even though the applicant never sought to rescind it, Wardlow failed to show that his case fell "'within the small category of cases in which asserted state grounds are inadequate to block adjudication of a federal claim.'" *Id.* at 4 (quoting *Kemna*, 534 U.S. at 381). This decision is correct not only for the reasons stated by the Fifth Circuit but also because it is evident the state court applied a discretionary procedural rule under *Beard*. Thus, the lower court did not err, and Wardlow's request does not warrant review.

IV. The Fifth Circuit Correctly Found That the District Court's Rejection of his Substantive Claims Was Not Debatable.

The Fifth Circuit held that, even if Wardlow could prove the debatability of the procedural bar, he could not demonstrate that the district court's alternative rejection

of the claims on the merits was debatable. App. 1 at 4. Agreeing with the district court that the state court's fact-findings (SCFF) were entitled to deference, the Fifth Circuit held that such deference to the findings "is a big part of why Wardlow cannot meet the COA threshold on his substantive claims." *Id*. The lower court concluded that, for all the reasons provided by the district court when analyzing the merits of Wardlow's three claims under that deferential lens, Wardlow was not entitled to a COA.[3] *Id*. Wardlow, however, fails to show that the Fifth Circuit erred in any of its determinations, and this Court should not grant Wardlow's petition.

A. The Fifth Circuit correctly found that the SCFF are entitled to deference.[4]

As mentioned above, the lower court upheld the district court's deference to the SCFF, noting that AEDPA requires deference unless the factual findings "are expressly

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[3] Wardlow quibbles with the Fifth Circuit's finding, arguing that the state court's fact-findings only played a role in the district court's denial of one out of the three claims. Petition at 20. But the Fifth Circuit had already determined that the merits of Wardlow's claims were not debatable *before* it referred to the district court's deference to the state fact-findings. *See* App. 1 at 4. The Fifth Circuit then held that any deference afforded to the fact-findings in the denial of his claims is a *big part* of—not the *entire* reason—why Wardlow cannot meet the COA threshold. *Id*. Moreover, whether the district court explicitly relied on the fact-findings or not does not relieve Wardlow of his burden of overcoming them with clear and convincing evidence. *See* App. 1 at 4.

[4] As he did in the court below, *see* App. 1 at 1, Wardlow raises this issue as an independent question presented. *See* Petition at i. However, because the lower federal courts' credibility determinations are related to those courts' resolutions of Wardlow's substantive claims on the merits—and an additional procedural issue relied on by the state trial court—the Director addresses this issue in conjunction with her discussion of the merits of the claims. *Cf. Kelly v. Dretke*, 111 F. App'x 199, 201 (5th Cir. 2004) (unpublished) (addressing an allegation that the district court made inappropriate credibility determinations at the summary judgment stage in the resolution of the three substantive issues which were "tainted" by those determinations).

rejected by, or are directly inconsistent with, the highest state court's ultimate resolution of the case." App. 1 at 4 (citing *Williams v. Quarterman,* 551 F.3d 352, 358 (5th Cir. 2008)). The Fifth Circuit explained that, "[b]ecause the [CCA's] procedural dismissal of Wardlow's application did not cast any doubt on the trial court's factual findings, we must accept them unless Wardlow can rebut them by 'clear and convincing evidence.'" *Id.* (citing 28 U.S.C. § 2254(e)); *see Sumner v. Mata*, 449 U.S. 539, 546 (1981) (noting that § 2254(d) "makes no distinction between the factual determinations of a state trial court and those of a state appellate court"); *see also Kirkpatrick v. Chappell*, 926 F.3d 1157, 1170 (9th Cir. 2019) (even if appellate court concludes petitioner's waiver was invalid, court must defer to California Supreme Court factual findings unless rebutted by clear and convicting evidence). Indeed, there is no indication that the CCA disagreed with the SCFF on Wardlow's claims; it merely dismissed the application because it had previously accepted Wardlow's waiver. Nothing about the CCA's actions rendered the findings invalid. The lower court thus concluded that the SCFF were entitled to deference under AEDPA. *Id.*

The Fifth Circuit's application of § 2254(e)(1) is consistent with its own precedent and the language of the statute. *See Williams*, 551 F.3d at 358 (explaining that state court findings are entitled to the presumption of correctness unless they are "directly inconsistent with the appellate court's decision"); *Murphy v. Davis,* 901 F.3d 578, 595–97 (5th Cir. 2018), *cert. denied,* 139 S. Ct. 1263 (2019) (holding that although the CCA dismissed the application on procedural grounds, § 2254(e)(1) provides deference to the state trial court's alternative merits findings because they were not directly

inconsistent with the CCA's dismissal for abuse of the writ); *Austin v. Davis,* 876 F.3d 757, 779 (5th Cir. 2017), *cert. denied,* 138 S. Ct. 2631 (2018) ("Section 2254(e) limits our review of state-court fact findings, even if no claims were presented on direct appeal or state habeas."). In fact, multiple circuits agree that § 2254(e)(1) deference applies even when findings are not related to the adjudication of the merits of a claim. *See Sharpe v. Bell*, 593 F.3d 372, 379 (4th Cir. 2010) ("Where a state court looks at the same body of relevant evidence and applies essentially the same legal standard to that evidence that the federal court does . . . , Section 2254(e)(1) requires that the state court's findings of fact not be casually cast aside."); *Pirtle v. Morgan,* 313 F.3d 1160, 1167–68 (9th Cir. 2002) (concluding that even though state court did not reach the merits of claim, under AEDPA, SCFF are still presumed correct); *Appel v. Horn*, 250 F.3d 203, 210 (3d. Cir. 2001) (concluding that even when § 2254(d) does not apply, § 2254(e) still applies such that a state court's factual determinations are presumed correct).

Perhaps acknowledging the difficulty that deference to the SCFF presents, Wardlow focuses his argument on the supposed effect of the CCA's dismissal order on the filing of his application. Petition at 17–18. He complains that the Fifth Circuit ignored his argument that the CCA's dismissal amounted to a deprivation of the trial court's jurisdiction; thus, the SCFF did not survive the CCA's review and are not entitled to deference.[5] *Id.* Wardlow cites to *Sumner* to support his argument that the

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[5] Paradoxically, Wardlow contradicts the argument he makes in Section III, *supra.* That is, when arguing that the CCA's dismissal is not an adequate procedural bar, Wardlow argues that the CCA's order accepting his waiver had *no* effect on his ability to file a state habeas application, and therefore, the dismissal should not bar federal review. *See id.*; *see also* Petition at 10 (The CCA's "order did not erect a barrio to

presumption of correctness applies only to "cases in which *a state court of competent jurisdiction* has made 'a determination . . . of the factual issue.'" Petition at 18. Wardlow argues, because of the CCA's dismissal, the trial court did not have a "case or controversy" before it and, thus, no power to adjudicate the case. Petition at 19 (citing *Klein v. Hernandez,* 315 S.W.3d 1, 3 (Tex. 2010)).

However, the Fifth Circuit's deference to SCFF without consideration of Wardlow's jurisdictional argument was proper. Indeed, a federal court should not determine a state-court issue such as the jurisdiction of the state trial courts. *Cf. Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) (explaining that it is not "the province of a federal habeas court to reexamine state-court determinations on state-law questions"); *see also Herb v. Pitcairn*, 324 U.S. 117, 125–26 (1945) ("Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights."). And Wardlow's arguments under *Sumner* refer to the pre-AEDPA version of § 2254(d). Petition at 17–18 (citing *Mata,* 449 U.S. at 546). However, the AEDPA version of § 2254 eliminated any jurisdictional inquiry. Regardless, under state statute, the trial court is indeed the proper court of jurisdiction for the filing of applications for writ of habeas corpus in death penalty cases, and the statute makes no mention of circumstances in which the CCA might divest the trial court of that jurisdiction. *See*

Wardlow's filing a habeas application—it merely permitted him not to file an application."). He now, however, argues that the CCA's waiver-order and subsequent dismissal-order had the *entire* effect of depriving the trial court of its jurisdiction. *See* Petition at 19 ("Thus, the order dismissing the habeas application held, in effect, that since Wardlow gave up his right to file a habeas application, his filing thereafter of his habeas application was unauthorized, and the trial court had no jurisdiction to consider it.").

Tex. Code Crim. Proc. art. 11.071 §§ 1, 4. Therefore, the district court and Fifth Circuit correctly presumed the trial court held proper jurisdiction. *See Lambert v. Blackwell*, 387 F.3d 210, 238 n.23 (3d Cir. 2004) ("[W]hen a valid state court judgment exists a federal habeas court should generally presume that the state court properly exercised its jurisdiction[,]" noting that this is "an area in which Congress spoke in AEDPA by facially eliminating the requirement of a jurisdictional inquiry.").

And even if a federal court could make the jurisdictional inquiry, there is no authority standing for the proposition that a federal court should not apply the presumption of correctness to SCFF simply because the CCA later dismissed the application on procedural grounds. Nor is there authority establishing that a federal court should not provide deference to SCFF even if the state court *did* lack jurisdiction under state law. Indeed, as a policy matter, comity instructs that the federal courts should not ignore the merits findings made by a state trial court and re-review such a claim de novo if it determines that the procedural ruling was inadequate to bar relief. *See (Michael) Williams v. Taylor,* 529 U.S. 420, 436 (2000) ("There is no doubt Congress intended AEDPA to advance these doctrines [of comity, finality, and federalism]."); *cf. Cullen v. Pinholster*, 563 U.S. 170, 185, (2011) (referencing "AEDPA's goal of promoting comity, finality, and federalism by giving state courts the first opportunity to review [a] claim, and to correct any constitutional violation in the first instance." (quotation omitted)). Wardlow fails to provide any authority to counter the application of the presumption in this circumstance. Certiorari review should be denied.

B. Wardlow's substantial interference claim is procedurally barred and without merit.

In his first substantive issue, Wardlow alleges that the State violated his due process rights by substantially interfering with co-defendant Tonya Fulfer's decision to testify at trial. Petition at 20–24. Wardlow specifically alleges that the State's pretrial plea offer to Fulfer—which was conditioned on the completion of Wardlow's trial—prevented her from providing testimony at his trial that would have corroborated his testimony that the shooting occurred during a struggle for the gun, thus negating the intent necessary for capital murder. *Id*. However, aside from being procedurally barred for the reasons discussed in Section III, *supra*, the claim is procedurally barred because trial counsel never objected on this basis at trial. Regardless, the claim is meritless.

1. Wardlow's claim is procedurally barred.

In addition to being procedurally defaulted, *see* Section III, *supra*, Wardlow's claim is barred because, as found by the state habeas court, Wardlow did not properly preserve error at trial:

> Wardlow failed to object on this basis at trial. Wardlow's counsel were aware of the plea agreement between the State and Fulfer since they attempted to have the agreement included in the record of Wardlow's trial as an offer of proof. Despite being fully aware of the factual basis asserted in support of this claim for relief, Wardlow failed to articulate a trial objection.

ROA.7341. Such findings are entitled to deference under § 2254(e)(1) and are entitled to even greater weight because the state habeas judge and the trial judge were the same person. *Cf. Schriro v. Landrigan*, 550 U.S. 465, 476 (2007) (state habeas judge who presided over trial "was ideally suited" to assess credibility of defendant "because she is

the same judge who sentenced Landrigan and discussed these issues with him."). As such, the issue was not preserved for appellate review under Texas's contemporaneous objection rule. *See* Tex. R. App. P. 33.1(a) (requiring as prerequisite for obtaining appellate review that the record must show that a complaint was made by timely objection stating grounds with "sufficient specificity" to make the trial court aware of the complaint); *McGinn v. State*, 961 S.W.2d 161, 166 (Tex. Crim. App. 1998) ("It is axiomatic that error is forfeited when the complaint on appeal differs from the complaint at trial."). Thus, even if the CCA's dismissal of Wardlow's habeas application was inadequate to bar review of this claim, the claim is nonetheless defaulted because he failed to comply with the Texas rules for preserving error.[6] *See* ROA.748; *Hogue v. Johnson*, 131 F.3d 466, 494–96 (5th Cir. 1997) (concluding that a claim was defaulted where state court application of the abuse-of-the-writ bar was inadequate but where, if the state had not found the application abusive, it would have found the claim barred by the state's contemporaneous objection rule). Wardlow does not demonstrate cause for either of his defaults, resultant prejudice, or a fundamental miscarriage of justice; therefore, federal habeas review of this claim is precluded.

2. Wardlow's claim lacks merit.

Even if Wardlow's claim is not procedurally defaulted, his claim is without merit. The Supreme Court has recognized that a criminal defendant has a constitutional right

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[6] The lower court did not make a specific finding on this procedural issue, and Wardlow does not now argue against this bar. However, notwithstanding whether the CCA's dismissal of his application bars federal review, Wardlow's failure to show the district court's determination on this procedural issue is fatal to his argument that a COA was warranted. *See Slack*, 529 U.S. at 484.

to "present his own witnesses to establish a defense." *Washington v. Texas*, 388 U.S. 14, 18–19 (1967); *United States v. Hammond*, 598 F.3d 1008, 1012 (5th Cir. 1979) (holding that this right is an element of due process of law guaranteed the defendant). Thus, this Court has held that substantial governmental interference with a defense witness's free and unhampered choice to testify may violate a defendant's due process rights. *United States v. Binker*, 795 F.2d 1218, 1228 (5th Cir. 1986); *United States v. Henricksen*, 564 F.2d 197, 198 (5th Cir. 1977). Still, the right of the defendant to present witnesses in his defense "is not unlimited; the defendants' Sixth Amendment rights do not override the fifth amendment rights of others." *United States v. Whittington*, 783 F.2d 1210, 1218–219 (5th Cir. 1986). And the defendant must show that the witness "would have testified favorably to the defendant." *United States v. Valdes*, 545 F.2d 957, 961 (5th Cir. 1977); *Henricksen*, 564 F.2d at 198 (noting that the testimony of the codefendant who was impeded from testifying "would have tended to *exonerate* Henricksen" (emphasis added)).

a. Wardlow cannot establish "substantial interference."

First, the record belies Wardlow's assertion that the State substantially interfered with Fulfer's decision whether to testify on Wardlow's behalf. Unlike the petitioner in *Henricksen*, on which Wardlow primarily relies, the plea agreement at issue here was not conditioned—expressly or otherwise—on Fulfer *not* testifying on Wardlow's behalf. *See Henricksen*, 564 F.2d at 198; *see e.g.*, ROA.6514 ("The State at one point did say that it might be necessary for her to testify at this trial, they did not say one way or the other about who she would testify to or for."). Rather, Fulfer's plea

was contingent only on the completion of trial and, in fact, was *not* made in exchange for her cooperation at trial. ROA.6513, 6516–19. Although the State may have indicated at one point that it *might* call Fulfer as a witness, the State removed Fulfer from the witness list entirely after Wardlow's letters were admitted into evidence. ROA.6515–16. Thus, as found by the state habeas court, Fulfer's agreement was not *in any way* contingent on whether she testified. ROA.6518, 7342. The district court properly found that Wardlow cannot show that the terms of the plea offer alone impacted Fulfer's decision not to testify. ROA.749.

Second, contrary to Wardlow's assertions, the record indicates that Fulfer's decision not to testify was based solely on her decision—per her attorney's advice—not to incriminate herself. *Cf. Knotts v. Quarterman*, 253 F. App'x 376, 381 (5th Cir. 2007) (unpublished) ("However, in order to demonstrate such a substantial interference and thus a due process violation, the defendant must show a causal connection between the governmental action and the witness's decision not to testify."). Indeed, the record shows that Fulfer appeared pursuant to a bench warrant issued by Wardlow's attorney accompanied by her attorney Charles Cobb. ROA.6393. Cobb informed the court that he had advised Fulfer that her capital murder case was still pending, and as such, she had an absolute right not to give any testimony related to her charges. ROA.6395. Cobb stated that he believed that Fulfer intended to assert her Fifth Amendment right not to incriminate herself and would decline to testify. ROA.6395. Cobb stated that he recommended that Fulfer not testify, and Fulfer testified that she was following his

advice and choosing not to testify. ROA.6401–02. When called before the jury, Fulfer asserted her Fifth Amendment right. ROA.6510.[7]

The facts of the instant case are readily distinguishable from the facts existing in those cases where federal courts have found due process violations. *See Henricksen*, 564 F.2d at 198 (plea agreement expressly contingent on not testifying on defendant's behalf); *Hammond*, 598 F.2d at 1012 (FBI agent told defense witness he would have "nothing but trouble" in pending state prosecution if he persisted in testifying); *cf. Webb v. Texas*, 409 U.S. 95, 97 (1972) (trial judge "gratuitously singled out this one witness for a lengthy admonishment on the dangers of perjury" and "went on to assure him that if he lied, he would be prosecuted and probably convicted for perjury, that the sentence for that conviction would be added on to his present sentence, and that the result would be to impair his chances for parole").[8]

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[7] Wardlow asserts that he was entitled to an evidentiary hearing on these facts. Petition at 23–24. However, Wardlow does not raise the district court's denial of an evidentiary hearing as a separate issue in the lower court, and the issue is, therefore, not properly before this Court. *See* Application for COA at 1–2, *Wardlow*, 750 F. App'x 374 (5th Cir. 2018). In any case, 28 U.S.C. § 2254(e)(2) prohibits evidentiary development of a claim where a petitioner failed to develop evidence in support of that claim in state court. (*Michael*) *Williams v. Taylor*, 529 U.S. 420, 431–32 (2000). Even assuming Wardlow could make the showing required by § 2254(e)(2)—which he does not—he is still not entitled to a hearing because: 1) the claim is procedurally defaulted; 2) the claim fails on its face because it relies on mere inferences of state-sponsored interference; and 3) Fulfer's testimony would not have aided Wardlow, as described further below. *See Landrigan*, 550 U.S. at 474 ("It follows that if the records refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing.").

[8] *See also United States v. MacCloskey*, 682 F.2d 468, 475 (4th Cir. 1982) (prosecutor telephoned attorney for witness, against whom charges had been dropped, and said that attorney "would be well-advised to remind his client that, if she testified at MacCloskey's trial, she could be reindicted if she incriminated herself during that

At bottom, the State's plea offer was not conditioned on Fulfer not testifying, and this fact cannot be inferred from the mere existence of an offer. Wardlow's attempts to cast doubt on the State's motivations by arguing that the State knew Fulfer's testimony would benefit him are similarly nothing more than inferences and rank speculation. *See e.g.*, Petition at 22. There is also absolutely no indication in the record, and notably Wardlow does not even allege, that Fulfer was otherwise threatened by government actors. Instead, Wardlow merely underrates a co-defendant's unwillingness to incriminate herself when capital murder charges are pending against her. And her attorney's advice not to testify is simply not the government conduct necessary to establish a due process claim. Fulfer's decision not to testify was hers and hers alone, and Wardlow cannot establish governmental interference.

b. Fulfer's testimony would not have aided Wardlow.

Importantly, Fulfer's testimony would not have corroborated Wardlow's claims that the gun went off during a struggle and that he did not intend to kill Cole. Indeed, putting aside the record evidence that contradicts Wardlow's testimony—that he came to Cole's house armed with a gun, that he cut the phone lines, that Cole was shot "execution style" right between the eyes, and Wardlow's own admission that he shot Cole because "he pissed me off"—Wardlow contends that without Fulfer's testimony, he

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testimony"); *United States v. Morrison*, 535 F.2d 223, 227–28 (3d Cir. 1976) (prosecutor repeatedly warned prospective defense witness about possibility of federal perjury charge and culminated indirect warnings with highly intimidating personal interview of witness); *United States v. Thomas*, 488 F.2d 334, 335 (6th Cir. 1973) (prosecutor, through Secret Service agent, sought out witness and gratuitously admonished him of possibility that he would be prosecuted for misprision of a felony).

was unable to negate the intent requirement. But her testimony would not have inured to his benefit. Specifically, the state habeas court found that at her guilty plea hearing two months after Wardlow's trial, Fulfer testified that Wardlow had explained that his plan was to gain entrance into Cole's home and "knock Cole over the head with a flashlight and take his money." ROA.7342. "Wardlow had never said anything about shooting Cole," so Fulfer had not known that Wardlow had taken a gun with him to the robbery. ROA.7342. Yet Wardlow's true plan became clear when—to Fulfer's surprise—Wardlow pulled a gun out of his waistband and pointed it at Cole. ROA.7342. Notably:

> Fulfer saw Cole and Wardlow begin to struggle over the gun, then she turned and ran away out of the carport. Fulfer stopped at the end of the carport, turned, and asked Wardlow to drop the gun. According to her testimony, *Fulfer [was not] looking at them when the gun went off, and she [did not] see what happened*. She was all the way out of the carport when the gun went off.

ROA.7342.[9] These findings are presumed correct. 28 U.S.C. § 2254(e)(1). Thus, Wardlow cannot show that Fulfer's testimony would have aided his defense, much less that the evidence would have "tended to exonerate" him. In fact, Fulfer's version of events was consistent with the State's theory as established by Wardlow's first letter and other witnesses. *See* ROA.6298–301; Statement of the Case I, *supra*. Importantly, Fulfer did

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[9] Fulfer's testimony essentially comports with the version of events Fulfer related in her statement to Wardlow's state habeas counsel. ROA.160. However, she added an additional statement—she believed that Cole's death was an accident because Wardlow did not intend to shoot him. *Id*. But even taking Fulfer's statement to be true, it is based only on her subjective *belief* about Wardlow's state of mind, and thus, its admissibility is questionable. Regardless, her statement is unsigned and unsworn, and it is therefore hearsay that cannot be considered by this Court to the extent it contradicts Fulfer's previous testimony or offers new facts. *Cf. Bonds v. Cox*, 20 F.3d 697, 702 (6th Cir. 1994) (unsworn affidavit that was not dated not competent evidence).

not actually witness the shooting. Nor does her testimony corroborate Wardlow's claim that he did not intend to kill Cole; it establishes only that *she* did not intend to kill Cole. The state habeas court found "incredible any assertion that Fulfer would have testified that the shooting was an accident, was not intended by Wardlow, or occurred during a struggle over the gun." ROA.7343. Wardlow fails to overcome the presumption of correctness afforded this finding, and the record precludes federal habeas relief.

c. Even assuming constitutional error, any such error is harmless.

Because Wardlow cannot demonstrate any constitutional error, the Court need not engage in a harm analysis. *See* ROA.754. However, the district court appropriately found that it is well settled that the harm analysis under *Brecht v. Abrahamson*, 507 U.S. 619 (1993), applies to federal habeas proceedings. *Fry v. Pliler*, 551 U.S. 112, 121–22 (2007) (stating that *Brecht* must be applied "whether or not the state appellate court recognized the error and reviewed it for harmlessness"). Thus, even assuming Wardlow could demonstrate constitutional error—which he cannot—he does not demonstrate that the error was not harmless.

C. Wardlow's IATC failure-to-object claim is without merit.

Wardlow next alleges IATC for failing to object to the testimony of the medical examiner, Barnard, regarding the distance from which the shot was fired. Petition at 25–27. Wardlow primarily argues that Barnard was not qualified to provide such testimony, and that the lower courts ignored relevant state law in determining that trial counsel was not ineffective. *Id.* Wardlow argues that the claim was plainly debatable. But he is incorrect.

The familiar *Strickland* standard governs IATC claims. *Strickland v. Washington*, 466 U.S. 668, 668 (1984). To demonstrate ineffectiveness, an inmate must establish deficient performance and resultant prejudice. *Id.* at 687. A failure to prove either requirement results in the denial of the claim. *Id.* at 697. "Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). "Even under de novo review, the standard for judging counsel's representation is a most deferential one." *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

To establish deficient performance an inmate must show that "counsel's representation fell below an objective standard of reasonableness," but there is a "strong presumption" that counsel's representation was within the "wide range" of reasonable professional assistance. *Strickland*, 466 U.S. at 688–89. This presumption requires that courts not simply "give [an inmate's] attorneys the benefit of the doubt, but to affirmatively entertain the range of possible reasons [an inmate's] counsel may have had for proceeding as they did." *Pinholster*, 563 U.S. at 196 (internal quotation marks and citations omitted). Counsel is not required to file frivolous motions or make frivolous objections. *Green v. Johnson*, 160 F.3d 1029, 1037; *McCoy v. Lynaugh*, 874 F.2d 954, 963 (5th Cir. 1989). It is well-settled that "failure to make a frivolous objection does not cause counsel's performance to fall below an objective level of reasonableness." *Green*, 160 F.3d at 1037 (citing *Sones v. Hargett*, 61 F.3d 410, 415 n.5 (5th Cir. 1995)); *accord McCoy*, 874 F.2d at 963.

Concerning prejudice, an inmate must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have

been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." *Id*. at 693. Rather, counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id*. at 687.

State law regarding the evaluation of an expert's qualifications was unclear at the time of Wardlow's trial. *Vela v. State*, 209 S.W.3d 128, 131 (Tex. Crim. App. 2006) (noting that, although the Court had "touched on the qualification analysis in prior cases, [it had] never discussed it in depth," but now holding that such analysis involves a two-step inquiry: "[a] witness must first have a sufficient background in a particular field, but a trial judge must then determine whether that background 'goes to the very matter on which [the witness] is to give an opinion.'"). As such, Wardlow cannot show that, even if counsel had objected, any objection would have been sustained. *Cf. Bobby v. Van Hook*, 558 U.S. 4, 7–8 (2009) (holding that it was error for the court to judge counsel's conduct in the 1980s based on guidelines promulgated in 2003).

Nevertheless, the state habeas court found that Barnard was appropriately qualified:

> Dr. Jeffrey Barnard, chief medical examiner of Dallas County, testified at Wardlow's trial. Dr. Barnard testified that he had performed an autopsy on the victim's body on June 15, 1993, and had determined the cause of death to be a gunshot wound to the head. He further testified that the absence of any identifiable residue on the entrance wound indicated that there was a distance of three feet or more between the weapon and the victim when the weapon was fired. While the State presented evidence of Dr. Barnard's qualifications as a medical examiner to testify regarding cause of death, they did not present evidence of his qualifications to render an opinion on the issue of distance, and trial counsel did not object to the

> testimony on that basis. Nonetheless, the affidavit submitted by Dr. Barnard in these proceedings indicates that Dr. Barnard has been a medical examiner in Dallas County since 1987 and the chief medical examiner since 1991; prior to working at Dallas County he trained in a Forensic Pathology Fellowship at the Medical Examiner's Office in Suffolk County, New York; he is board-certified in anatomical pathology, clinical pathology, and forensic pathology; he has spent significant time in the Firearms Examiner's section and examining firearms related injuries; his opinions are based on his experience and training as well as range-of-fire testing performed at his office; he has performed between 4,000 and 5,000 autopsies, many of which involved firearms, and has testified in court approximately 400 to 500 times on criminal cases, many of which also involved firearms injuries. Dr. Barnard's affidavit also indicates that his office conducted test-firing of a weapon similar to the murder weapon in this case (a .45 caliber Llama semi-automatic pistol) discharging a .45 caliber auto Federal cartridge with the same 230 grain full metal jacketed projectile as was involved in the death of Mr. Cole. The testing indicated that gunpowder deposited densely at 12 inches to 24 inches, but was also present from 24 inches, with a few gunpowder particles at 36 inches. These results are consistent with Dr. Barnard's testimony at Wardlow's trial. C.E. Anderson, who submitted an affidavit in this case on Wardlow's behalf in which he opined that a .45 caliber Llama semi-automatic pistol discharging a .45 auto Federal cartridge would leave stippling up to fourteen inches, but not three feet, did not personally examine the murder weapon in this case nor conduct test-firing of similar weapons; Anderson also did not have the opportunity, as Dr. Barnard did, to examine the victim's body.

ROA.7349–50. Wardlow does not overcome the presumption of correctness afforded these SCFF. § 2254(e)(1). And these findings establish that the lower courts properly found Barnard was qualified to testify on the distance from which the murder weapon was fired. *See* ROA.768. Indeed, in *Pollard v. State*—upon which Wardlow relies—the state intermediate appellate court found medical examiner testimony regarding the distance from which the gun was fired admissible because it was based on his expertise as a medical examiner and his examination and evaluation of the wound characteristics. No. 09-06-294-CR, 2007 WL 2493144, at *4 (Tex. App.—Beaumont 2007) (unpublished).

And in *Dianas v. State*, the state court found admissible—over defense counsel's objections—a medical examiner's testimony, based on her training, her experience with gunshot wounds, and her analysis of the wound, that the gun was fired from more than two feet away. No. 01-10-00123-CR, 2011 WL 2623956, at *5–6 (Tex. App.—Houston [1st Dist.] 2011) (unpublished)

Here too Barnard based his opinion on his expertise as a medical examiner and his examination of the entrance wound. ROA.5901. The state court's findings establish that Barnard had experience with gunshot wounds at the Firearms Examiner's section and through the numerous autopsies he conducted in which gunshot wounds were the cause of death. *See* ROA. 7349–50. Barnard did not even opine as to the exact distance the gun was fired, despite questioning from Wardlow's trial counsel. *See* ROA.5908–09. Counsel simply cannot be deemed deficient for failing to advance a meritless objection. And even if counsel had objected, the State would have had the opportunity to establish with more specificity Barnard's qualifications, and the objection would have been overruled. Wardlow can prove neither deficient performance nor prejudice, and the claim is without merit.

D. Wardlow's IATC at punishment claim is without merit.

Finally, Wardlow alleges IATC for failing to conduct a reasonable mitigation investigation, which resulted in the failure to provide his mental health expert, Dr. Don Walker, with a full picture of Wardlow's life prior to trial. Petition at 27–35. Wardlow specifically faults counsel for failing to uncover evidence that: 1) his mother suffered from some undiagnosed mental illness resulting from *her own* abusive upbringing; 2)

his mother experienced episodes of rage; 3) she believed she had been abducted by aliens and shared this belief with Wardlow, who in turn so believed; 4) his mother's paranoia and excessive protectiveness inhibited normal social development; 5) Wardlow experienced head trauma and loss of oxygen at birth; and 6) Wardlow attempted suicide twice before the murder. *Id*. at 28–29. Wardlow also challenges Walker's report with the opinion of Dr. Paula Lundberg-Love, who found that both Wardlow and his mother "possess some type of schizophreniform disorder." *Id*. at 30–33. But Wardlow fails to demonstrate that his trial counsel were ineffective.

"Mitigating evidence that illustrates a defendant's character or personal history embodies a constitutionally important role in the process of individualized sentencing, and in the ultimate determination of whether the death penalty is an appropriate punishment." *Riley v. Cockrell*, 339 F.3d 308, 316 (5th Cir. 2003) (citing *Moore v. Johnson*, 194 F.3d 586, 612 (5th Cir. 1999)). Accordingly, counsel has a duty to make reasonable investigations. "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690–91. But "*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing." *Wiggins v. Smith*, 539 U.S. 510, 533 (2003). Rather, the question of the effectiveness of pretrial investigation is one of degree; it is not subject to precise measurement. *Strickland*, 466 U.S. at 680; *Dowthitt v. Johnson*, 230 F.3d. 733,

743 (5th 2000). And a capital habeas petitioner must also show prejudice in that "there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695.

Here, trial counsels' investigation was more than adequate. Indeed, as found by the state habeas court, Wardlow's attorneys interviewed numerous potential character witnesses, including Wardlow's parents. ROA.7348. Most witnesses counsel interviewed either did not want to testify for Wardlow or had nothing helpful to offer. *Id.* This included Wardlow's parents, who trial counsel determined would not be good witnesses because they did not have a good demeanor or appearance, provided inconsistent information, appeared unaffectionate and cold, and were "loose cannons." *Id.* Importantly, when asked if there was any history of brain damage or other mental illness, both Wardlow and his parents "provided no remarkable information." *Id.*

Counsel cannot be deficient simply because they did not uncover and present the additional mitigating evidence state habeas counsel—with a far more cooperative defendant and defendant's family—uncovered and presented. Indeed, counsel's actions are usually based, quite properly, on informed strategic decisions based on information supplied by the defendant. *See Strickland*, 466 U.S. at 691 ("[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable."); *Johnson v. Cockrell*, 306 F.3d 249, 252–53 (5th Cir. 2002) (evidence of any history of abuse or brain injury never disclosed despite specific

questions on these topics). The evidence Wardlow now relies on was therefore not necessarily available to counsel through means independent of Wardlow and his family; indeed, Wardlow offers no records of any type documenting child abuse, neglect, or psychological treatment.

Despite this, Wardlow's trial attorneys asked their trial expert Walker to perform a psychological examination of Wardlow prior to trial. ROA.7348. Counsel explained to Walker the State's theory of how the crime was committed and provided background information, including Wardlow's age and education. ROA.7348. Walker interviewed Wardlow and conducted psychological tests. ROA.7348. During the interview, Wardlow again denied any abuse as a child, although he indicated he was bruised as a child when he was "butt whipped." ROA.7348. Wardlow also claimed he attempted suicide at least a couple times five years prior to the interview, and he expressed anger and disbelief over his mother "turning him in." ROA.7348. Walker submitted to counsel a written report of the evaluation, in which Walker found no evidence of mental illness or defect and arrived at a primary diagnosis of antisocial personality disorder or borderline personality disorder. ROA.7348–49.

Counsel concluded that the report contained nothing helpful to Wardlow's defense and decided against calling Walker at trial. ROA.7348–49. Wardlow points to certain "red flags" in Walker's report as evidence that trial counsel did not properly investigate Wardlow's case. *See* Petition at 31. But trial counsel were aware of the contents of the report and nonetheless did not believe such evidence was in Wardlow's best interest. ROA.7348–49. Contrary to Wardlow's protestations, *see* Petition at 34–35, it is

reasonable for counsel to believe that such evidence was more likely to be perceived as aggravating, rather than mitigating, to a jury. *See Wiggins,* 539 U.S. at 535 (Wiggins's history "contained little of the double edge we have found to justify limited investigations in other cases."); *Kitchens v. Johnson*, 190 F.3d 698, 702–03 (5th Cir. 1999) (finding counsel's decision not to investigate mitigating evidence of child abuse, alcoholism, and mental illness was sound strategy where evidence was "double-edged" in nature).

Instead, counsel presented testimony from three witnesses who were acquainted with Wardlow through school and church and could testify as to his positive character traits. ROA.7348. This was consistent with counsel's strategy—also apparently supported by Wardlow—to combat the State's future dangerousness case:

> [A]t the conclusion of the punishment phase of Wardlow's trial, outside the jury's presence, Wardlow himself acknowledged in open court that he did not wish to testify at the punishment phase and that he did not wish to call any further witnesses. Counsel had explained the tactical reasons for that decision. It is evident from the evidence presented and arguments made by counsel at the punishment phase of trial that trial counsel employed a punishment-phase strategy of emphasizing the lack of violent history on the part of Wardlow and arguing that the State had failed to prove future dangerousness.

Id.; *Landrigan*, 550 U.S. at 476–77 (finding that where the defendant interferes with counsel's attempts to present a case in mitigation, he cannot later claim ineffective assistance). Wardlow cannot overcome the deference afforded these SCFF. § 2254(e)(1).

Wardlow now relies on Lundberg-Love's affidavit to demonstrate that, had Walker been provided with the social history that Wardlow now proffers, he would have been aware of the schizophreniform disorder. Petition at 33. But trial counsel were

entitled to rely on the expert assistance they obtained. *See Murphy*, 901 F.3d at 592 (holding that, although hiring an expert and having her testify "does not give counsel license to 'completely abdicate . . . responsibility,'" "counsel should be able to rely on that expert to alert counsel to additional needed information or other possible routes of investigation"); *Smith v. Cockrell*, 311 F.3d 661, 676–77 (5th Cir. 2002), *overruled in part on other grounds*, *Tennard v. Dretke*, 542 U.S. 274 (2004)). That state habeas counsel found an expert willing to testify favorably does not mean that trial counsel were deficient in their efforts.[10] Indeed, the Fifth Circuit has held that "testimony of experts not involved in the [] trial proceedings" is "irrelevant to counsel's perspective" at the time of trial. *Martinez v. Dretke*, 404 F.3d 878, 886 (5th Cir. 2005). At the time of trial, counsel were faced with a defendant and his family who were unwilling or unable to help, and it was certainly reasonable for trial counsel to believe that Wardlow would be infinitely more able to relate his background to Walker. The fact that Wardlow did not then—but does now—does not make trial counsel deficient. In any event, Wardlow does not demonstrate that Walker's opinion would have changed had he been privy to this new information. Wardlow only provides the competing opinion of a second expert. This is not enough to establish that counsel was deficient.

Even assuming *arguendo* that trial counsel was deficient, the district court correctly found that Wardlow cannot demonstrate prejudice. ROA.765–67. First, the district court appropriately found that the mitigating evidence Wardlow now proffers is

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[10] If Wardlow faults trial counsel for failing to call Lunderg-Love at trial, he fails to show that she was available to testify at the time of trial. *Day v. Quarterman*, 566 F.3d 527, 538 (5th Cir. 2009).

not substantial in quantity and does not present an overly sympathetic case. ROA.765 (citing *Woodford v. Visciotti*, 537 U.S. 19, 26 (2002) (per curiam)). Indeed, the primary thrust of the evidence relates to Wardlow's mother, *not* Wardlow himself, so its mitigating value is slight. *See* Tex. Code Crim. Proc. art. 37.071 § 2(e)(1) (focusing on "the circumstances of the offense, the *defendant's* character and background, and the personal moral culpability of the *defendant*") (emphasis added). Also, that Wardlow's social development was inhibited by his mother's behavior is contradicted by the record, as the witnesses who testified all described him as helpful and considerate. *See* Statement of the Case II.B, *supra*. The mitigating value of this evidence is thus slight.

Conversely, "submitting evidence suggesting that Wardlow was unstable, lacked family support, or had mental problems could have contributed to a future dangerousness finding." ROA.767. And although there is no evidence that Walker would have reached the same conclusions as Lundberg-Love if he had been presented with the same evidence, it is certainly true that evidence of a mental illness such as a schizophreniform disorder could be considered more aggravating than mitigating, thus further diminishing the mitigating value. *See* ROA.767; *see also Trevino v. Davis*, 861 F.3d 545, 551 (5th Cir. 2017) (holding that proposed evidence showing that petitioner had Fetal Alcohol Spectrum Disorder, but also that he was violent and involved in gang activity, was "a significant double-edged problem that was not present in *Wiggins*," and which did not prejudice petitioner); *Miniel v. Cockrell*, 339 F.3d 331, 346–48 (5th Cir. 2003) (upholding the state court's conclusion that the petitioner was not prejudiced by counsel's failure to investigate and present evidence of abuse and neglect during his

childhood); *Ladd v. Cockrell*, 311 F.3d 349, 349 (5th Cir. 2002) (failure to present evidence of troubled childhood, mental retardation diagnosis as a child, low IQ test score, being put on a psychomotor inhibitor, and good behavior in institutional settings not prejudicial because some of the evidence was double edged, and the rest had only "minimal[]" mitigating value).

Finally, when this new evidence is taken together with that presented at trial and weighed against the State's aggravating evidence, Wardlow cannot establish that he would not have been sentenced to death. Indeed, Wardlow continues to downplay the seriousness of the offense and to overemphasize his lack of prior acts of violence, *see* Petition at 28, but the district court properly found that Wardlow fails to acknowledge:

> [T]he victim was an elderly man, that [Wardlow] planned the crime and concocted a ruse to get into the victim's home, that he took his mother's gun and concealed it in his waistband, that he cut the victim's phone lines, that he went to the victim's house several times before finding the most opportune moment to commit the crime, and that he knew the keys were in the victim's truck thereby obviating any need to confront the victim if all he wanted to do was secure a vehicle to leave town.

ROA.766. Yet Wardlow chose to carry out his plan at gunpoint, culminating in the execution-style gunshot to the victim's head. Wardlow cannot show that additional investigation, or the addition of Lundberg-Love's testimony, would have shown that the balance of the aggravating evidence against the mitigating evidence did not warrant death. ROA.766. Thus, no reasonable jurist would debate the district court's conclusion that Wardlow's claim lacks merit.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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