

In the Supreme Court of the United States

ERICA YVONNE SHEPPARD, PETITIONER

v.

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION
(CAPITAL CASE)

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should this Court grant review to correct alleged errors in the Fifth Circuit's application of 28 U.S.C. § 2254 to petitioner's claim of ineffective assistance of counsel?
2. Should this Court grant review to correct alleged errors in the Fifth Circuit's application of 28 U.S.C. § 2254 to petitioner's claim under *Batson v. Kentucky*, 476 U.S. 79 (1986)?

RELATED PROCEEDINGS

State of Texas v. Erica Yvonne Sheppard, No. 668,505, in the District Court of Harris County, Texas, 185th Judicial District (March 3, 1995)

Sheppard v. State, No. 72,127 (Tex. Crim. App. June 18, 1997)

Ex parte Sheppard, No. WR-78,132-01, 2013 WL 5568434 (Tex. Crim. App. Oct. 9, 2013)

Sheppard v. Texas, No. 13-820, 134 S. Ct. 2288 (May 19, 2014)

Sheppard v. Livingston, No. 4:14-cv-00655, 2017 WL 1164293 (S.D. Tex. March 29, 2017)

Sheppard v. Davis, No. 18-70011, 967 F.3d 458 (5th Cir. July 22, 2020)

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Review is unwarranted because petitioner’s challenges to the Fifth Circuit’s ruling amount to fact-bound requests for error correction. Even if such rote error correction were a proper basis for review, there is no error to correct. To support her case for review in this Court, petitioner essentially restates the views of the dissenting judge below, who disagreed with the majority’s conclusion that the state court reasonably rejected petitioner’s ineffective-assistance claim. At most, that demonstrates that fairminded jurists can disagree about the merits of the state court’s decision. That falls short of the showing required to overcome the relitigation bar imposed by 28 U.S.C. § 2254(d), and it falls even further short of the showing required to justify review in this Court. The Fifth Circuit followed this Court’s settled precedent in evaluating the state court’s decision through the lens of § 2254.

Petitioner believes that the Fifth Circuit was wrong. It was not. Petitioner's claim of error in the application of settled law does not warrant this Court's review.

STATEMENT

1. Marilyn Meagher lived with her teenaged daughter in Houston, Texas. R.5927.¹ On the evening of June 30, 1993, Meagher's daughter returned to their apartment from a day at school and work, R.5926–28, and noticed her mother's car missing. R.5945. She later went into a spare bedroom and found her mother's body in a pool of blood. R.5949-50. Meagher's body had been left underneath bed linens with a plastic dry cleaning bag wrapped tightly around her head and three knives and a broken statue nearby. R.6003-10. Law enforcement took a finger and palm print from the door to the spare bedroom. R.6105-13. Those prints were matched to Sheppard's left hand. R.6114.

On the day before Meagher's murder, Korey Jordan, a friend of Sheppard's brother Jonathan, was at Jonathan's apartment, which was in the same complex as Meagher's. R.6284-87. Jordan heard Sheppard and James Dickerson, Jonathan's boyfriend, talk about "carjack[ing]" someone for money. R.6286-92. When Dickerson complained of being broke, Sheppard said, "let's go back to the old theme." R.6290. Dickerson responded, "If taking a life is what I have to do to get some money, then that's what I have to do." R.6291. Sheppard then said, "I'd rather catch a . . . preferably a skinny white woman walking between her car and her apartment with no children." R.6292-93. After suggesting a possible target, Dickerson retrieved two knives from Jonathan's kitchen, but Sheppard complained that the

¹ R._ refers to the record on appeal before the Fifth Circuit.

knives weren't "long enough or sharp enough to kill anyone." R.6294. She also told Dickerson, "You're not going to stab anyone in the car and get blood all over us and the car." R.6295. The two then discussed what to wear and left Jonathan's home in dark-colored clothes. R.6295-96. Sheppard and Dickerson attempted to "jack" a woman that evening, R.6567-70, but the woman ran into her apartment before she could be attacked. R.6579, 6602.

On the day of the murder, Sheppard and Dickerson noticed that the trunk of Meagher's car was open and "decided [they] would rob whoever was in the apartment and steal the [car]." R.6361-62. Armed with a knife from Jonathan's apartment, Sheppard entered Meagher's apartment followed by Dickerson. R.6362. After tackling Meagher to the ground, Sheppard gave her knife to Dickerson, who held it to Meagher's neck and told her to be quiet or he'd "slit her throat." R.6362-63. After Meagher begged for her life pleading that she had children, Dickerson slashed at Meagher's neck, but the knife was too dull to cut. R.6363. Sheppard went to Meagher's kitchen, retrieved a butcher's knife, and brought it to Dickerson. R.6363. Sheppard then left to search for money and car key but was summoned back to find "blood gushing from the woman's throat." R.6363-64. Meagher was still breathing, so Sheppard held her down while Dickerson hit Meagher in the head with a statue. R.6364.

An autopsy documented multiple cutting and stab wounds on Meagher's body. R.6377-78. One was three-and-a-quarter inches across, reaching from the front to the back of Meagher's neck, penetrating a vertebra. R.6379-80. Another went three inches into Meagher's neck resulting in the incision of a jugular vein. R.6381. Meagher also had wounds consistent with self-defense, some of which went to the bone in her hands and fingers.

R.6383–84. Contusions on her head were consistent with the statue being slammed against it with “a great deal of force.” R.6381.

The day after the murder, Korey Jordan contacted law enforcement. R.6022. That same day, Meagher’s vehicle was discovered in Bay City, Texas. R.6025. A friend of Sheppard’s confirmed that Sheppard and Dickerson had used the vehicle on the evening of Meagher’s murder. R.6206-11. Dickerson’s fingerprint was on the vehicle. R.6085-86.

The following day, police arrested Sheppard and Dickerson in a motel room in Bay City. R.6233. They found a knife similar to one found near Meagher’s body. R.6240-43. Sheppard confessed to the murder after she was taken back to Houston. R.6321-35, 6405-07.

2.a. On March 1, 1995, a jury found Sheppard guilty of capital murder. R.6547-48. During the punishment phase of the trial, the State offered evidence that Sheppard regularly engaged in criminal behavior. Two law enforcement officers testified that Sheppard had a bad reputation for being peaceful and law-abiding. R.6684, 6691. She had admitted to a friend that she would “jack” cars and sell their parts for profit. R.6624-25. Sheppard had also confessed to her attempt to “jack” another woman with Dickerson the night before Meagher’s murder. R.6567-70. Sheppard had also helped orchestrate a “drive-by” shooting, the victim of which was hospitalized and left with at least one bullet lodged near his spinal cord. R.6636-42, 6670-74.

The State also presented evidence that Sheppard showed no signs of remorse. Two inmates housed with Sheppard before trial said Sheppard would draw attention to news coverage of Meagher’s murder “like she was bragging.” R.6697-98, 6721. Sheppard made them so uncomfortable that they asked jail personnel to remove her from their “tank.” R.6701, 6722. Sheppard told one inmate that she should not be imprisoned for Meagher’s

murder because “that bitch is dead . . . and there ain’t nothing they can do to bring her back.” R.6698. Sheppard also threatened to harm a fellow inmate, and she inquired about how she could fake her way into the section of the jail reserved for inmates with mental disorders. R.6702-04.

Finally, the State presented testimony from Meagher’s family about the impact of her death. Meagher’s son said his mother’s death put him into “a state of shock.” R.6729. He felt like he was robbed of decades with his mother, and Meagher was prevented from seeing important moments in his life. R.6731. Meagher’s son sought professional psychiatric help to cope with his mother’s murder and, at the time of trial, her death still left him “scared” and “sad.” R.6732. Meagher’s sister stated that her loss sometimes prevented her from eating, sleeping, or working. R.6736. Her children, Meagher’s nephews, also obtained counseling to deal with Meagher’s death, and Meagher’s mother was “depressed and fatigued and just traumatized.” R.6738-39.

b. Sheppard’s trial counsel began its investigation into her background in October 1993, when it hired private investigator John Castillo. R.9068. The investigator first met with Sheppard on October 19 to discuss the murder and Sheppard’s background. R.9069–75. In February 1994, the investigator contacted Sheppard’s brother, Jonathan, by telephone. R.9078. A subsequent attempt to contact Jonathan failed because his number was no longer in service. R.9081.

Sheppard’s punishment-phase presentation attempted to rebut the State’s showing of future dangerousness and to make a case for mitigation. In addition to five witnesses, including one expert, Sheppard introduced into evidence several documents to support her case for mitigation.

Sheppard presented Patricia Birdwell, director of the Matagorda County Women's Crisis Center, who testified that her organization provided "protection for abused women and children." R.6789; R.6791. She confirmed that Sheppard was admitted to the Center and identified records regarding Sheppard. R.6789-91; R.6843-82. Those records revealed that Sheppard's daughter was ill at some point with a high temperature, that Sheppard was concerned about her grandmother's poor health, that Sheppard wanted a divorce and was in "a lot of pain," and that she was attending support group meetings, counseling, and seeking legal assistance. R.6843-46; R.6876-81.

Ronda Robinson, the custodian of records for the Covenant House—"an emergency shelter for runaway and homeless youths"—testified that Sheppard was previously admitted to Covenant House. R.6793-95; R.6883-6924. The records from Sheppard's first two-day stay showed: she was sixteen years old at the time with a young child; she was referred to Covenant House by the Houston Police Department because "her and her mother don't get along"; she came to Covenant House seeking "shelter for her and her baby"; the organization was going to help Sheppard get a GED because she "lack[ed] . . . educational skills"; Sheppard planned to save up enough money for her own place; Sheppard was working at Astroworld; Child Protective Services (CPS) had no records of involvement with Sheppard; Covenant House personnel told a CPS worker that Sheppard alleged physical abuse by her mother, she would not return to her mother's home, police had been called regarding this abuse, but Sheppard did not display evidence of physical abuse; Sheppard's mother denied any physical abuse and agreed to take Sheppard home. R.6890; R.6901-05; R.6920.

Sheppard's second stay at Covenant House lasted nine days, and the records showed: Sheppard was seventeen at the time with a young child; Sheppard had been in a car accident, but had no physical or behavioral impairments when admitted, although she complained of neck and back injuries; Sheppard was a "Baptist"; she was referred to a GED program and individual and group counseling by Covenant House personnel; Sheppard was again pregnant but her mother was unaware; Sheppard had one sibling named Jonathan who was in the Navy; she had a history of running away from home; she dropped out of school in the tenth grade; and she previously left Covenant House when she went "AWOL." R.6884-86; R.6894-95; R.6906-07.

Psychiatrist Priscilla Ray rendered an opinion on "Sheppard's mental background and health." R.6798-99. Dr. Ray had determined that Sheppard suffered from depression—only partially treated—and that it likely had a genetic component given the "family history of depression." R.6799-6800. Dr. Ray also stated that Sheppard exhibited "sadness" and cried while describing her crime, indicating remorse. R.6803.

Dr. Ray opined that, based on Sheppard's "current status, past events of violence, the nature of the crime [she was] currently charged with, and the overall statistical likelihood of dangerousness," she did not believe that Sheppard posed a probability of violence in the future. R.6801-04. Further, Dr. Ray expressly stated that if Sheppard were incarcerated in a Texas prison, she would not pose a future danger in that setting either. R.6804.

Dr. Ray also discussed Sheppard's susceptibility to influence. She stated that Sheppard, with "her history and her tendency to perhaps be more easily led by men into a position that is abusive, . . . is more of a follower than she is not." R.6818. Dr. Ray concluded that if Sheppard were removed from "a situation in which a man is likely to be abusive or

possibly may be abusive and has some sway over her,” that would additionally reduce her chances of future violence. R.6818-19.

In addition to her testimony, Dr. Ray’s report was admitted into evidence. R.6827. It stated: Sheppard was raised by her maternal grandmother; both her grandmother and mother had significant health problems; Sheppard’s parents divorced when she was young and she saw her father infrequently; and Sheppard had one full brother, one half-brother, and one step-brother, but she was closest to her grandmother. R.6925.

Dr. Ray’s report further explained: Sheppard left school in the tenth grade “because she was pregnant”; Sheppard failed fourth grade but eventually obtained her GED “because she ‘wanted [her] education’”; she was attending school to become a medical assistant but stopped because Jerry Bryant—her baby’s father—“wanted her at home”; she was well-behaved in school, never being suspended; and Sheppard was “reared in the Baptist religion.” R.6925-26.

The report further described sexual abuse Sheppard had endured. Sheppard, “[w]hen asked specifically about sexual or physical abuse or neglect, . . . indicate[d] that she was going to a rape support group,” and that she had been to the “Women’s Crisis Center in Matagorda County.” R.6926. “At three to five year[s] of age, her mother left her with a friend . . . [whose] boy friend would touch her between her legs and make her suck his ‘dick’ and hit her if she didn’t do it.” R.6926. Sheppard told her mother about the abuse, but her mother did not believe her; her grandmother did, however, and Sheppard went to live with her instead. R.6926. Around sixteen or seventeen, Sheppard’s mom kicked her out and she began living on the “streets.” R.6926. There, Sheppard “was raped by a man with a knife,”

who said “no one would believe her.” R.6926. Concerning trauma, Sheppard stated she “trie[s] to block it out and still has nightmares but she ‘keeps it inside.’” R.6926.

Additionally, the report noted: Sheppard had three children, each by a different father; she had not seen the first two fathers since becoming pregnant; Bryant “abused her and hit her,” and he said that “he would find [Sheppard] and kill her” if she left him; and that she filed charges against Bryant, but the police “did not do anything,” causing her to turn to the Crisis Center. R.6926. The report further explained: Sheppard’s mother—who was seeing a psychiatrist—had a history of depression; Sheppard wanted mental health treatment but could not afford it; Sheppard was depressed, having mood swings from sadness to anger; she had decreased appetite, difficulty sleeping, and irritability; and she heard voices, but her other symptoms (and mood swings) decreased after she was medicated in jail. R.6927.

The report also contained Sheppard’s side of the story regarding Meagher’s murder. Sheppard denied agreeing to harm anyone for money the day before Meagher’s murder. R.6927. Instead, she allegedly told Dickerson to get a job in response to his complaints about poverty. R.6927. On the day Meagher was killed, Sheppard claimed she was walking with her baby when Dickerson suddenly pulled a knife, saying “he would kill her and her baby” if “she didn’t go with him.” R.6927-28. After that, Sheppard said she was in “shock,” acting only under duress. R.6928. Sheppard allegedly tried to clue in others that she was being held against her will, and she claimed that Dickerson planted a knife in her clothes at the motel. R.6928.

The report noted that Sheppard had “gotten along O.K.” in jail and that other inmates had tried to “start[] things” with her, but she “trie[d] to stay out of it.” R.6929. It concluded

that Sheppard was competent to stand trial, was not insane at the time she committed the offense, and was, “because of her background, . . . more susceptible to threats by men who are in a position to be abusive and to be more easily influenced in such situations.” R.6929.

Sheppard also called Patrice Green, who stated that Sheppard attended church “[a]ll of her life,” had three children, and worked for Green’s husband, a justice of the peace. R.6828-31.

Sheppard’s final witness was her grandmother, Annie Smith, who testified that: she was Sheppard’s primary caregiver; Sheppard never spent more than “a week or two with her mother”; Bryant abused Sheppard; and Sheppard sought shelter apart from her grandmother to avoid Bryant. R.6833-35.

The defense argued that the jury had to consider Sheppard’s “background, her record, [and] her emotional instability” in considering the mitigation special issue. R.6953. Counsel specifically asked the jury to look at the records introduced in the case, R.6954-58, and argued that Sheppard’s youth and motherhood were mitigating, R.6958-60, as was the abuse she suffered from Bryant, R.6958. This was bolstered by the fact that Allen—Bryant’s former “common-law” wife—admitted Bryant beat her, too. R.6958-59. Counsel further argued that Sheppard “was young, she was frightened, and her baby was in jeopardy,” in explaining Sheppard’s actions. R.6959.

Lead defense counsel continued the mitigation theme at closing. He argued that Sheppard had no convictions, R.6963, that there were no specifics regarding Sheppard’s supposed other car “hijackings,” R.6964, and that the drive-by shooting was dismissed because of insufficient evidence, R.6965. The defense further argued that prosecutors brought forth no acts of violence while Sheppard was incarcerated awaiting trial, and that the inmates

testifying on the State's behalf were not worthy of belief, R.6966-67. Counsel reiterated that Sheppard was "young," "female," has "kids," and has "a background of abuse," making her "led by men easily." R.6968. Finally, counsel claimed that the State brought no evidence regarding Sheppard's probability of violence while incarcerated, and that Sheppard was remorseful for her actions, making the appropriate answers to the special issues ones that mandated a life sentence. R.6970-72.

Based on the jury's answers to the special issues, Sheppard was sentenced to death. R.2776-77.

3. The Texas Court of Criminal Appeals ("CCA") affirmed the conviction and sentence on direct review. *Sheppard v. State*, No. AP-72,127 (Tex. Crim. App. June. 18, 1997); *see* R.390-412. Among other issues raised in her appeal, Sheppard challenged the trial court's *Batson* ruling.

When the State used a peremptory challenge to strike venire member Ronnie Simpson from the jury panel, Sheppard objected and challenged the strike under *Batson v. Kentucky*, 476 U.S. 79 (1986), because Simpson was African-American. R.3635. The record reflects that Simpson was the first black juror against whom the prosecutor exercised a peremptory strike. R.3635. Counsel argued that because there were no questions asked that would give rise to a challenge for cause, the State "may have used their strike in this particular case simply because of the race of the potential juror." R.3635.

Although the trial court gave no indication that a *prima facie* case of discrimination had been established at this point, the prosecutor nevertheless asked whether the Court wished the State to articulate its reasons for striking Simpson. After the court responded in the

affirmative, the prosecutor offered four independent concerns underlying the peremptory challenge.

First, the prosecutor noted that he “thought [Simpson] was going to end up answering Special Issue No. 3 yes” because when asked “how he felt about a defendant who had kids facing the death penalty . . . he said that . . . was a factor he would consider in answering Special Issue No. 3.” R.3636. This caused concern since evidence was going to come out Sheppard had three young children. R.3636. Second, the prosecutor noted that Simpson was “the victim, unfortunately, of a false arrest or he had to spend a short period in jail as a result of being misidentified by someone.” R.3636-37. Third, the prosecution “had a great deal of concern” about the fact that, when the prosecution asked Simpson whether he could “give the death penalty based solely on the facts of the crime” Simpson “answered after a long period of reflection that it would be tough to do that, leading [the prosecutors] to believe that he’s not going to be very likely to side with the State in answering the special issues.” R.3637. The fourth reason was that, when introduced to Sheppard, Simpson had “shifted over, looked at the defendant, and said hello”—something Simpson had not done when the prosecutors introduced themselves—leading to the concern that “there is a bit of affinity between Mr. Simpson and the defendant.” R.3637.

Defense counsel attempted to counter the race-neutrality of the State’s proffered explanation, but the trial court found the effort unpersuasive and overruled the *Batson* objection. R.3638-40.

Sheppard re-urged her objection later in the *voir dire* proceedings, arguing that two white venire members accepted by the state had “practically the same” response to questions on the questionnaire dealing with the death penalty as did Simpson whom they struck.

R.3813. The challenge was again overruled by the trial court. R.3813. At the conclusion of *voir dire*, Sheppard raised the *Batson* challenge yet again. Prior to Sheppard's argument on the issue, the prosecutor asked the trial court to take judicial notice of the fact that (1) two of the jurors selected to serve in the case, Denise L. Ray and Robert Williams, were black; and (2) only three of the nine peremptory challenges exercised by the state were against black venire members. R.5887-88. Defense counsel conceded these facts, R.5888, but nevertheless insisted the strike against Simpson was racially motivated, R.5889-90. The trial court denied Sheppard's *Batson* claim and request to place Simpson on the jury. R.5891.

On appeal, the CCA concluded that "[t]he State's race-neutral apprehensions are well established in the record. On appeal, the trial court's ruling is accorded great deference and will not be overturned unless clearly erroneous. Accordingly, we will not disturb the trial court's ruling." R.3023 (citation omitted). Sheppard did not file a petition for a writ of certiorari on her direct appeal.

4. Sheppard then filed a state habeas application raising forty claims of error. R.7142-7295. Two claims are relevant here. First, Sheppard again raised her claim that the trial court erred in denying her *Batson* challenge to the state's peremptory strike of potential juror Ronnie Simpson. But the court held that it was bound by the CCA's prior determination. R.8505-06. Second, Sheppard alleged that her attorneys were ineffective for failing to reasonably investigate and present mitigating evidence. R.7202-48. In support, Sheppard attached several affidavits from individuals she alleged counsel should have spoken with and called as witnesses. R.7346-7501. The State responded, arguing that relief was unwarranted based on evidence that was offered. R.7534-7648.

The state court later held a live evidentiary hearing. R.8631. Sheppard introduced additional affidavits supporting her application. R.9027-61. She also called and examined the attorneys who represented her at trial, Sheppard's mother, and the prosecuting district attorney, on a number of issues (*e.g.*, failure to investigate, failure to call certain witnesses at the guilt-innocence phase, failure to object, etc.). R.8654-8799; R.8800-24; R.8824-66, R.8898-8921; R.8921-93; R.8993-9005.

Several months after the conclusion of the hearing, Sheppard submitted three more affidavits. R.7691-7748; R.7811-39; R.7847-53. Three years later, the parties submitted proposed findings of fact and conclusions of law to the State habeas court, and Sheppard filed another affidavit from Dr. Ray. R.7862-7958; R.8392-8454; R.8365-70.

Almost a year later, the habeas trial court issued findings of fact and conclusions of law recommending denial of relief on thirty-nine of Sheppard's claims, but proposing relief on Sheppard's fourteenth claim related to mitigation evidence on her background. R.8490-95. Specifically, the state habeas court faulted counsel for "not develop[ing] testimony from Rhonda Robinson of the Covenant House regarding Ms. Sheppard's character, her background or her stays at the Covenant House." R.8493. Similarly, although the defense called Sheppard's grandmother, counsel did not bring out testimony regarding Sheppard's "background, character, physical abuse, sexual abuse and education." R.8494. The state habeas court concluded that "[t]rial counsel was ineffective for failing to present evidence that would aid the jury in understanding the connection between evidence of [Sheppard's] background and character and issue of mitigation." R.8515. The State objected to the state habeas trial court's proposed findings. R.8605-24.

In a unanimous opinion, the CCA rejected that conclusion. *Ex parte Sheppard*, No. WR-78,132-01, 2013 WL 5568434, at *2 (Tex. Crim. App. Oct. 9, 2013) (per curiam) (unpublished); Pet. App.104–07. The CCA reviewed the mitigating evidence and found “that the testimony the trial court faults counsel for not developing through Robinson, Davenport, and Smith was actually before the jury through the testimony and report of Birdwell, Dr. Ray, and others.” *Id.* at *1–2. It concluded that a “decision not to present cumulative testimony does not constitute ineffective assistance” and denied habeas relief. *Id.* at *2. This Court denied Sheppard’s petition for a writ of certiorari. *Sheppard v. Texas*, 134 S. Ct. 2288 (2014).

6. Having failed to obtain relief on direct appeal or state-habeas review, Petitioner turned to federal court. Among other issues, Sheppard’s federal habeas petition raised her *Batson* claim and her claim that trial counsel rendered ineffective assistance by failing to develop and present mitigation evidence. R.27; R.689.

Denying relief on the *Batson* claim, the district court found that Sheppard failed to rebut the race-neutral reasons given by the prosecution for using its peremptory strike. R.2254-56. Specifically, the record did not “so clearly demonstrate that the State’s answers were pretextual as to support a finding that the trial court’s ruling, based not only on the explanations, but also on the court’s observation of the proceedings and determinations of the participants’ credibility, was wrong.” R.2256.

The district court also denied relief on the ineffective-assistance claim, holding that Sheppard failed to overcome AEDPA’s relitigation bar. R.2225. Though the district court believed the CCA reached the wrong conclusion, it found that its opinion was not unreasonable. R.2237-38. The district court granted a COA on Sheppard’s IATC claim regarding

mitigation evidence. R.2214-72. The Fifth Circuit later expanded the COA to include Sheppard's *Batson* claim. Order, *Sheppard v. Davis*, No. 18-70011 (5th Cir. Aug. 17, 2018).

7. The Fifth Circuit affirmed. Over a dissent, the court affirmed the denial of relief on Sheppard's ineffective-assistance claim, concluding that even if counsel's performance had been deficient, the CCA reasonably determined that Sheppard failed to show prejudice. With respect to factual testimony that counsel failed to discover and present, the majority concluded (and the dissent agreed) that it was cumulative of evidence before the jury. Pet. App. 13. And with respect to additional expert testimony introduced in state-habeas proceedings, the majority concluded that the CCA's decision was not objectively unreasonable because the expert testimony before the jury "previewed the salient points of the subsequent expert findings." *Id.* The majority further concluded that Sheppard's claim of prejudice would fail even on de novo review because Sheppard's mitigation evidence did not outweigh the aggravating evidence introduced at trial. *Id.* at 14–15.

The court unanimously rejected Sheppard's *Batson* claim. Recognizing that Sheppard raised a question whether two of the proffered reasons for striking Simpson "may have been" pretextual, the court determined that the remaining two reasons were legitimate and unrebutted, noting "the deference AEDPA affords to a state court's factual findings." *Id.* at 19. It also noted that there was no evidence of systematic efforts to exclude African-American venire members from the jury, as "two of the jurors selected were African-American, and the state exercised only three of its nine peremptory challenges against African-American venire members." *Id.* at 20. Accordingly, it determined that the CCA "properly rejected Sheppard's *Batson* claim." *Id.*

REASONS FOR DENYING THE PETITION

Sheppard’s petition challenges the Fifth Circuit’s conclusion that the Texas Court of Criminal Appeals reasonably denied relief on her claims under *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Batson v. Kentucky*, 476 U.S. 79 (1986). Pet. 24-40. Sheppard does not dispute, however, that the Fifth Circuit identified these decisions as controlling the court’s analysis of her claims; she merely disagrees with the outcome. Petitioner seeks mere error correction, but that does not justify this Court’s review, and there is no error to correct in any event. The Court should deny review because this is not the “rar[e]” case justifying certiorari review “when the asserted error consists of . . . the misapplication of a properly stated rule of law.” Sup. Ct. R. 10.

I. The Fifth Circuit’s Fact-Bound Analysis of Petitioner’s Ineffective-Assistance Claim Does Not Warrant Review.

A. This case does not present a disputed question about the governing standard of review.

Sheppard first argues that the petition should be granted because “the Fifth Circuit has adhered to a rule that § 2254(d) review applies to only the result of the state court decision and not the reasoning for it,” in conflict with this Court’s decision in *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). Pet. 16. That argument is misguided because there is no conflict between *Wilson* and the Fifth Circuit’s decision.

The decision below pointedly declines to address the question whether *Wilson* forbids lower courts, for purposes of § 2254(d), to “consider ‘not only the arguments and theories the state habeas court actually relied upon to reach its ultimate decision but also all the arguments and theories it *could have* relied upon.’” Pet. App. 10 (quoting *Evans v. Davis*, 875 F.3d 210, 216 (5th Cir. 2017)); see also *Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002)

(en banc) (per curiam) (explaining that review under § 2254(d) traditionally focuses “on the ultimate legal conclusion that the state court reached and not on whether the state court considered and discussed every angle of the evidence”). True, the court “observe[d], without deciding, that it is far from certain that *Wilson* overruled *sub silentio* the position—held by most of the courts of appeals—that a habeas court must defer to a state court’s ultimate *ruling* rather than to its specific *reasoning*.” Pet App. 11 n.5. But it had no need to decide the question in this case. *Id.* at 11 (“This court has not assessed *Neal*’s continuing vitality in the wake of *Wilson*, and we need not do so today.” (footnote omitted)).

For purposes of its decision below, the court assumed “that *Wilson* permits us to afford deference to only the state court’s proffered reasoning—instead of its result.” *Id.* at 11–12. Applying that standard, it determined that “the TCCA’s decision was reasonable.” *Id.* at 12. The court went on to explain that Sheppard’s claim would fail even under de novo review, *Id.* at 14, further demonstrating that any dispute about the standard of review after *Wilson* did not determine the outcome here.

B. The Fifth Circuit applied the correct legal standard to petitioner’s ineffective-assistance claim.

1. The Fifth Circuit’s fact-bound analysis of Sheppard’s claim that counsel rendered deficient performance does not merit review.

The CCA concluded that Sheppard’s trial counsel did not render constitutionally deficient performance. Pet. App. 107. Evaluating that decision under 28 U.S.C. § 2254(d), the Fifth Circuit concluded that the CCA’s decision was reasonable; therefore, Sheppard failed to overcome AEDPA’s relitigation bar. Pet. App. 12. The Fifth Circuit’s application of settled law to Sheppard’s ineffective-assistance claim does not warrant this Court’s review.

Even on de novo review, courts must grant substantial deference to trial counsel's performance, finding constitutional inadequacy only when the "representation fell below an objective standard of reasonableness . . . under prevailing professional norms." *Wiggins*, 539 U.S. at 521. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland v. Washington*, 466 U.S. 668, 689 (1984). Under *Strickland*, a reviewing court is "required not simply to 'give the attorneys the benefit of the doubt,' but to affirmatively entertain the range of possible 'reasons . . . counsel may have had for proceeding as they did.'" *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011) (citation and alteration omitted).

When a state court has rejected a petitioner's ineffective-assistance claim on the merits, a federal habeas court's review is even more deferential. *See Harrington v. Richter*, 562 U.S. 86, 105 (2011) ("Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult."). *Strickland* and § 2254(d) each impose "highly deferential" standards, "and when the two apply in tandem, review is 'doubly' so." *Id.* (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)). "When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Id.*

Sheppard's ineffective-assistance claim centers on additional testimony that she alleges counsel should have presented at the punishment phase of her trial. That includes testimony by Sheppard herself, Madelyn McNeil (Sheppard's mother), Annie Smith (Sheppard's grandmother), Jonathan Sheppard (Sheppard's brother), Kelly Lynn Garcia (an inmate at Harris County jail), Janie Whitaker (a chaplain at Harris County jail), Ronda Robinson (a

counselor at Covenant House), Glenda Davenport (Director of the Matagorda County Women's Crisis Center), and expert witnesses Dr. Mark Cunningham, Dr. Rebekah Bradley, and Dr. Myla Young. R.7204–48; Pet.7–10. As found by the state court, though, none of these witnesses would have added anything materially new to the case. While trial counsel investigated the possibility of calling some of these individuals, the state court identified good reasons for not presenting them.

Counsel made a strategic decision not to call Sheppard's mother as a witness. Sheppard now argues that trial counsel failed to interview her mother about her background solely because "speaking to her 'wasn't very pleasant,'" Pet. 24–25 (quoting R.8787), but that misstates the record. Counsel decided not to call petitioner's mother because he thought she would be harmful to the petitioner's mitigation case. Sheppard's mother frequently spoke to the media, and trial counsel was concerned that he could not control her if she testified. R.8125. That was a reasonable decision, particularly considering that Sheppard's mother was responsible for much of the childhood abuse she suffered. R.8125 ("I considered her a very dangerous person to put on the stand."). In any case, Sheppard's mother insisted on sitting in the courtroom during trial even after she was advised that it would disqualify her from being a witness. R.1827.

Counsel had reason to believe that Sheppard's brother Jonathan would not be a helpful witness because he was not cooperative with the defense. R.8105–06. Sheppard suggests that this belief was founded only on Jonathan's failure to affirmatively seek him out, Pet. 24, but that is inconsistent with the record. Trial counsel observed James Dickerson's trial, and he was aware that Dickerson's investigator "was talking to Jonathan." R.8105. He testified to his belief that Jonathan "could have helped James Dickerson and I think he could

have helped Erica Sheppard. He did not want to do either one of them.” R.8106. In any case, the information Jonathan might have provided about Sheppard’s background had already been presented to the jury through Dr. Ray’s testimony and report. *Compare* Pet. App. 272–78, *with* R.6925–29 (Pet. App. 174–78)

The petition also relies on counsel’s supposed failure to call Sheppard herself as a witness. Pet. 26–27. The CCA found, however, that Sheppard “made an informed decision not to testify at trial.” R.8515. That finding is supported by the record. *See* R.8135 (trial counsel’s testimony that Sheppard made the decision not to testify). As *Strickland* recognizes, it is “quite proper[.]” for a lawyer to base his actions “on informed strategic choices made by the defendant and on information supplied by the defendant.” 466 U.S. at 691.

Considering all of the evidence, it was not unreasonable for the CCA to conclude that Sheppard failed to prove deficient performance under *Strickland* based on counsel’s investigation and presentation of mitigating evidence. Indeed, it was not until 2000 that this Court and others began “emphasizing the importance of thorough mitigation investigation in capital defense cases.” Emily Hughes, *Mitigating Death*, 18 Cornell J.L. & Pub. Pol’y 337, 352 (2009). “Starting with [*Terry*] *Williams v. Taylor*[, 529 U.S. 362,] in 2000, and then continuing with *Wiggins v. Smith* in 2003, and *Rompilla v. Beard*[, 545 U.S. 374,] in 2005, the Court launched a series of decisions emphasizing the importance of thorough mitigation investigation in capital defense cases.” Hughes, *supra*, at 352 (footnotes omitted). *Terry Williams*, *Wiggins*, and *Rompilla* all reversed decisions holding that trial counsel was *not* ineffective and did so over dissents from other members of this Court. None suggest that the judges and justices who saw things differently were unreasonable. Those cases clarified the law regarding minimally adequate mitigation investigations, increasing the likelihood

of success for ineffective assistance claims based on trial counsel’s inadequate investigation of such evidence.

At the time of Sheppard’s trial in 1995, however, this Court’s case law suggested that trial counsel’s mitigation investigation was consistent with prevailing professional norms. In *Burger v. Kemp*, for example, this Court held that counsel’s failure to offer any “mitigating evidence at all” was not ineffective. 483 U.S. 776, 788 (1987). And in two other cases—*Strickland* and *Darden v. Wainwright*, 477 U.S. 168 (1986)—this Court had rejected challenges to very limited mitigation investigations. In *Strickland*, counsel merely spoke with the defendant as well as the defendant’s wife and mother; counsel did not seek out other character witnesses or request a psychiatric examination. 466 U.S. at 672-73; *see also id.* at 699 (“Trial counsel could reasonably surmise from his conversations with [his client] that character and psychological evidence would be of little help.”). And in *Darden*, trial counsel merely obtained a psychiatric report. 477 U.S. at 185. The effort of Petitioner’s trial counsel in pursuing a psychiatric evaluation, evaluating family members as potential mitigation witnesses, and obtaining testimony from five witnesses, including an expert who documented Sheppard’s background and history of physical and sexual abuse, compares well to these pre-2000 cases. Viewing the facts “in light of [the] law at the time,” the CCA was not unreasonable in determining that trial counsel’s punishment-phase investigation and presentation “fell well within the ‘wide range of professionally competent assistance.’” *Smith v. Murray*, 477 U.S. 527, 536 (1986) (quoting *Strickland*, 466 U.S. at 690).

2. The Fifth Circuit’s fact-bound evaluation of prejudice does not warrant review.

Petitioner suggests that the Fifth Circuit applied an incorrect legal standard by requiring her to prove, by a preponderance of the evidence, that the result would have been different but for counsel’s alleged deficient performance. *See* Pet. 28. Petitioner is mistaken. The Fifth Circuit correctly explained that “a defendant is prejudiced if ‘there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding *would* have been different.’” Pet. App. 9 & n.1 (quoting *Andrus v. Texas*, 140 S. Ct. 1875, 1881 (2020) (per curiam)). It also recognized that in making that determination, courts must “consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweigh it against the evidence in aggravation.” *Id.* at 9 (quoting *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (per curiam)). “[T]he question” on prejudice “is not whether a court can be certain counsel’s performance had no effect on the outcome.” *Richter*, 562 U.S. at 111. “Instead, *Strickland* asks whether it is ‘reasonably likely’ the result would have been different”; “[t]he likelihood of a different result must be substantial, not just conceivable.” *Id.* at 111-12. Applying those settled standards through § 2254(d)(1), the Fifth Circuit determined that the CCA was not unreasonable in determining that Sheppard failed to show prejudice from trial counsel’s alleged ineffective assistance at the mitigation phase.

Sheppard’s argument thus reduces to a claim that the Fifth Circuit erred in its application of § 2254(d) and this Court’s well-established standard for identifying prejudice. Indeed, she maintains that the Fifth Circuit’s decision was not merely wrong but “unreason-

able” because the state-habeas trial court and the district court believed she made the requisite showing of prejudice. Pet. 29. But under § 2254(d)(1), “an *unreasonable* application of federal law is different from an *incorrect* application of federal law.” *Richter*, 562 U.S. at 101 (quoting *Terry Williams*, 529 U.S. at 410). A state court’s determination “is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance.” *Wood v. Allen*, 558 U.S. 290, 301 (2010). In order to overcome AEDPA’s relitigation bar, Sheppard must show that the CCA’s decision rejecting her claim “was so obviously wrong that its error lies ‘beyond any possibility for fairminded disagreement.’” *Shinn v. Kayer*, 141 S. Ct. 517, 523 (2020) (per curiam) (quoting *Richter*, 562 U.S. at 103).

Sheppard’s attempt to overcome AEDPA’s relitigation bar on the prejudice prong of her ineffective-assistance claim is self-defeating. She focuses on the state trial court, the federal district court, and the dissent below, which maintained that she had established prejudice. But the Fifth Circuit majority concluded that the CCA’s determination to the contrary was reasonable. Pet. App. 12. Moreover, the majority below concluded that Sheppard’s prejudice claim would fail even under de novo review. *Id.* at 14. Far from showing that the CCA’s decision was unquestionably wrong beyond any possible disagreement among fairminded jurists, the sequence of decisions in this case proves that the correctness of the CCA’s decision is, at the very least, debatable among jurists of reason. At best, the additional testimony would have been cumulative of facts already in the record; at worst, it could have been harmful.

The bulk of the additional evidence identified by Sheppard in state habeas proceedings would have been cumulative of evidence already presented to the jury through other witnesses, particularly Dr. Ray. Based on her review of medical records and a clinical psychiatric interview, Dr. Ray testified that:

- Sheppard suffered from depression that was only partially treated, R.6800;
- Sheppard's depression had a biological component but also resulted from psychological stress from childhood to the present, R.6800;
- Sheppard was not likely to commit future acts of violence and would not be a continuing threat to society if sentenced to life in prison, R.6803–04;
- Sheppard was easily led by men in certain situations and would be less likely to engage in violent acts if removed from exposure to abusive men, R.6818–19.

Dr. Ray's report provided further details of Sheppard's background, including the following:

- Sheppard suffered repeated and horrific sexual abuse from ages 3 to 5, but her mother did not believe her, R.6926;
- She had been kicked out by her mother and forced to live on the streets, R.6926;
- Sheppard had been raped by a man with a knife, R.6926;
- Sheppard had three children by three different fathers, R.6926;
- The father of her third child abused her and threatened to kill her if she left him, R.6926;
- Sheppard had a family history of depression, R.6927;

- Sheppard claimed that on the date of the murder, James Dickerson pulled a knife on her and threatened to kill her and her baby if she did not go with him into Meagher’s apartment, R.6928; and
- Because of her background, Sheppard was likely “to be more susceptible to threats by men who are in a position to be abusive and to be more easily influenced in such situations,” R.6929.

Dr. Ray’s report was admitted into evidence, R.6825, and counsel urged the jury to consider it in their deliberations. R.6954. The record indicates that the jury did so: it asked to see the report, R.2744, as well as the records from Covenant House and the Matagorda County Women’s Crisis Center. R.2773.

The additional expert testimony that Sheppard introduced in state-habeas proceedings does not call the reasonableness of the CCA’s decision into question, even if it was not cumulative of the expert testimony presented at trial. This Court has long recognized that mitigation evidence tending to show that defendant’s troubled background caused his or her violence may be double-edged: Such evidence may reduce the defendant’s blameworthiness, but it may also suggest that the defendant is beyond rehabilitation. *See Penry v. Lynaugh*, 492 U.S. 302, 324 (1989); *Burger*, 483 U.S. at 793 (concluding that counsel was not deficient for failing to investigate and present mitigation evidence that also “suggest[s] violent tendencies”); *cf. Eddings v. Oklahoma*, 455 U.S. 104, 107-08 (1982) (faulting State for precluding the mitigating evidence of the petitioner’s troubled youth that suggested positive prospects for rehabilitation in adulthood); *Lockett v. Ohio*, 438 U.S. 586, 594 (1978) (plurality op.) (same for psychiatric information suggesting a positive prognosis for rehabilitation). This Court reiterated that common-sense notion in *Pinholster*, which reasoned that

“new evidence relating to Pinholster’s family” including “serious substance abuse, mental illness, and criminal problems” was “by no means clearly mitigating, as the jury might have concluded that Pinholster was simply beyond rehabilitation.” 563 U.S. at 201.

The evidence presented during both the guilt and sentencing portions, and accepted by the jury, was of such weight that Sheppard’s additional evidence does not create the “substantial” “likelihood of a different result” that *Strickland* requires, *Richter*, 562 U.S. at 112. The evidence contradicts Sheppard’s argument that she was coerced into participating in the murder. She tried to rob someone else the day before the murder. R.8136. She prepared for the robbery by bringing gloves and knives from Jonathan’s apartment. R.6293-95; R.8139. And she did not mention being threatened by Dickerson in her statement to the police. R.8142-43. Furthermore, the clinical diagnosis of psychological disorders proffered by Sheppard to the habeas court was double-edged evidence because the jury may have interpreted it as increasing Sheppard’s future dangerousness. The CCA’s decision that Sheppard failed to prove prejudice was not so clearly wrong that no reasonable jurist could think it was right. The Fifth Circuit therefore correctly denied relief.

II. The Fifth Circuit Correctly Applied This Court’s Precedent to Deny Petitioner’s *Batson* Claim.

Sheppard’s *Batson* claim was rejected at trial; it was adjudicated and denied by the CCA on direct appeal, R.390, 393; and the Fifth Circuit unanimously concluded that the CCA properly rejected the claim, Pet. App. 19–20. Sheppard maintains that the Fifth Circuit employed a “novel interpretation of *Batson*” that departed from this Court’s precedent, and led the court to reject her *Batson* claim merely because two of the prosecution’s four proffered reasons for the challenged strike were not rebutted. Pet. 32. She also complains

that both the CCA and the Fifth Circuit failed to consider whether “the stated, uncontradicted reasons were *true* rather than pretexts for discrimination.” Pet. 38–39. In her view, “upon consideration of all the relevant facts, any determination that the prosecutor’s strike was not racially motivated was unreasonable.” Pet. 39.

In a *Batson* challenge, “the claimant must make a *prima facie* showing that the peremptory challenges have been exercised on the basis of race. . . . [I]f this requisite showing has been made, the burden shifts to the party accused of discrimination to articulate race-neutral explanations for the peremptory challenges.” *United States v. Montgomery*, 210 F.3d 446, 453 (5th Cir. 2000). It is then up to the trial court to “determine whether the claimant has carried his burden of proving purposeful discrimination.” *Id.* The “shifting burden” set out in *Batson* is one of production only. *Soria v. Johnson*, 207 F.3d 232, 239 (5th Cir. 2000) (citing *United States v. Bentley-Smith*, 2 F.3d 1368, 1373 (5th Cir. 1993) (per curiam)). The ultimate burden of persuasion always lies with the defendant. *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curiam).

Only *Batson*’s third step is at issue here. When applying *Batson*, “[t]he critical question in determining whether a prisoner has proved purposeful discrimination at step three is the persuasiveness of the prosecutor’s justification for his peremptory strike.” *Fields v. Thaler*, 588 F.3d 270, 274 (5th Cir. 2009) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 338–39 (2003)). Because demeanor and credibility are crucial in determining whether the defendant has proven purposeful discrimination, this part of the analysis is solely in the province of the trial judge. *Elem*, 514 U.S. at 768. Ultimately, the trial court must decide “whether it was more likely than not that the [peremptory] challenge was improperly motivated.” *Johnson v. California*, 545 U.S. 162, 170 (2005).

Sheppard’s attack on the Fifth Circuit’s conclusion fails at the outset because she does not address AEDPA’s relitigation bar, let alone explain how she can overcome it. As the Fifth Circuit recognized, a state court’s determination that the prosecution’s race-neutral reasons are valid is a factual finding. Pet. App. 19. AEDPA provides that “a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.” 28 U.S.C. § 2254(e)(1). That means that Sheppard can overcome AEDPA’s relitigation bar only if she provides clear and convincing evidence to show that the state court’s factual determination was incorrect.

Sheppard has neither acknowledged this burden—her petition does not even cite § 2254(e)(1)—nor has she identified clear and convincing evidence to rebut the presumption of correctness. Highlighting her failure to recognize AEDPA’s applicability, Sheppard argues that the Fifth Circuit’s decision does not “square with the outcomes in any of the last three *Batson* cases this Court has decided”—*Flowers v. Mississippi*, 139 S. Ct. 2228 (2019); *Foster v. Chatman*, 136 S. Ct. 1737 (2016); and *Snyder v. Louisiana*, 552 U.S. 472 (2008). See Pet. 31–32. But those cases involved direct review of state court decisions; none involved a federal habeas petition. See *Flowers*, 139 S. Ct. at 2238; *Foster*, 136 S. Ct. at 1745; *Snyder*, 552 U.S. at 474. Sheppard’s complaint that the Fifth Circuit failed to consider whether “the stated, uncontradicted reasons were *true* rather than pretexts,” Pet. 39, fails to grasp that the court below was bound by the state court’s factual findings, both implicit and explicit—including the trial court’s implicit finding and the CCA’s explicit finding that the proffered reasons were valid, *Steven v. Epps*, 618 F.3d 489, 499 (5th Cir. 2010) (citing *Young v. Dretke*,

356 F.3d 616, 629 (5th Cir. 2004)). Sheppard’s failure to address AEDPA’s relitigation bar is a sufficient reason to deny the petition. *See* Sup. Ct. R. 15.4.

It is not the only reason. Sheppard also fails to account for the “highly deferential” standard of review that applies to a trial judge’s findings in a *Batson* challenge independently of AEDPA’s relitigation bar. *See, e.g., Snyder*, 552 U.S. at 479. Even under de novo review, “a trial court’s ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous.” *Id.* at 477. Sheppard cannot make this showing, either.

Sheppard’s attack focuses almost exclusively on the supposedly pretextual nature of the prosecution’s reasons for striking juror Simpson. That effort is both mistaken and conclusory, but it also fails to account for the Fifth Circuit’s consideration of other relevant facts. Contrary to Sheppard’s representation in the petition, the Fifth Circuit did not find that two of the reasons proffered for striking Simpson were “demonstrably ‘disingenuous,’” nor did the Director concede as much. *Contra* Pet. 33. The Fifth Circuit said only that “Sheppard persuasively posits that the prosecutor’s first two reasons *appear* disingenuous,” Pet. App. 18–19 (emphasis added), and the Director conceded only that a single white juror answered two questions similarly to juror Simpson, *id.* at 19. And the Fifth Circuit merely commented that the prosecution’s decision to strike Simpson “therefore suggests that the explanation *may have been* a pretext for discrimination.” *Id.* It concluded, however, that the remaining two reasons for striking Simpson were legitimate and un rebutted. *Id.* The court went on to consider other indicia of discriminatory motive, including the lack of “manipulative questioning or ‘jury shuffles’ to remove African-Americans,” *id.* at 20 (quoting *Miller-El*, 545 U.S. at 263), and the facts that “two of the jurors selected were African-

American, and the state exercised only three of its nine peremptory challenges against African-American venire members,” *id.*; *cf., e.g., Flowers*, 139 S. Ct. at 2246 (documenting the State’s use of “peremptory strikes to remove as many black prospective jurors as possible” over the course of multiple trials against the same defendant).

Sheppard’s analysis thus fails to account not only for the relevant standard of review but also for the full range of relevant facts. Her disagreement with the Fifth Circuit’s fact-bound decision in this case does not warrant this Court’s review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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