No. 21-444

In the Supreme Court of the United States

ANDRE LEE THOMAS, PETITIONER

v.

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

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

Whether the district court and the Fifth Circuit erred in concluding, applying the deference required by the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(d), that the state habeas court did not reach an objectively unreasonable conclusion in this case. Specifically:

I. Was it an objectively unreasonable application of this Court's precedents to determine that racial bias did not deprive Thomas of a fair trial when all jurors who were seated in the case explicitly agreed to hear the evidence presented, follow the law as instructed, and render an impartial verdict?

II. Was it an objectively unreasonable application of this Court's precedents to determine that Thomas failed to overcome the presumption that his trial counsel were effective when they made a strategic decision not to ask pointed, potentially inflammatory questions about racial biases of certain jurors when those jurors explicitly agreed to hear the evidence presented, follow the law as instructed, and render an impartial verdict?

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INTRODUCTION

After consuming large amounts of cough syrup containing hallucinogenic dextromethorphan, Andre Lee Thomas brutally murdered his estranged wife, his four-year-old son, and her thirteen-month-old daughter after breaking into her apartment. Thomas stabbed each to death, cut out their hearts, stabbed himself (inflicting wounds that proved not to be fatal), and later turned himself in to police, confessing to the murders.

There is no real dispute that Thomas committed these crimes, and Thomas does not ask this Court to review the state court's determination that he was competent to stand trial. Instead, he presents a claim that his trial was unfair because three jurors indicated their opposition to interracial marriage on juror questionnaires—though each also affirmed that they could hear the evidence, follow the law as instructed, and render an impartial verdict. Thomas also presents a *Strickland* claim based on his trial counsel's failure to conduct more extensive voir dire of these jurors or object to their seating.

Thomas's fair trial claim is procedurally defaulted on his own telling. His trial counsel did not object to the seating of any of the three jurors at issue, nor did his direct appeal challenge the seating of those jurors. Relitigation of this claim is thus barred under AEDPA. Even if it were not, it would fail on the merits because the state court did not unreasonably apply clearly established federal law as determined by this Court. Thomas's trial counsel questioned one of the jurors at issue about racial bias extensively in voir dire, the trial court ensured that the other two could render an impartial verdict in view of the evidence, and the record shows other reasons why

defense counsel might have wanted these jurors to serve on the jury.

Thomas's *Strickland* claim also fails. Thomas's trial counsel were experienced in conducting trials in Grayson County, Texas and presented affidavits affirming they made strategic decisions concerning the extent they questioned the jurors at issue about their views on interracial marriage during voir dire. Trial counsel also indicated that they used their preemptory strikes on jurors who in their view would have been much worse than those seated—each of whom defense counsel might have wanted on the jury for reasons supported by the record. Federal courts owe broad deference on AEDPA review to both the strategic decisions of trial counsel and to the state court that reviewed Thomas's claims. Under this doubly deferential standard, counsel's strategic decisions do not provide a basis for Thomas to obtain this Court's review.

Every court to address Thomas's claims has denied them—whether on direct or collateral review. This Court should deny the petition for a writ of certiorari.

STATEMENT

I. Thomas's Crime and Trial

A. In 2004, after consuming cough syrup containing the hallucinogenic dextromethorphan (DXM), ROA.2143[1], Thomas broke into the Sherman, Texas home of his estranged wife and murdered her, the four-year-old son he had with her, and her thirteen-month-old infant daughter. Thomas went to his victims' home and,

[1] "ROA" refers to the record on appeal in *Thomas v. Lumpkin*, No. 17-70002 (5th Cir. 2021). "RR" refers to the "Reporter's Record" of trial proceedings. "CR" refers to the "Clerk's Record" of trial court filings.

using a different knife for each victim, stabbed them to death and cut out their hearts. *Id.* at 2111. He stabbed himself in the chest as well but that wound did not prove fatal. *Id.* at 2111-12. When he realized he would not expire from his self-inflicted injury, Thomas walked home, taking his victims' organs with him, only to later turn himself in to the Sherman Police. *Id.* at 2112-13. The state trial court appointed two local attorneys to represent Thomas—R.J. Hagood (lead) and Bobbie Peterson (second chair). *Id.* at 2110.

Because Thomas further injured himself while awaiting trial, his counsel moved for a competency examination. *Id.* at 2114. The court's appointed expert and the State's expert both agreed that Thomas was incompetent, so the court remanded him into the custody of a psychiatric unit for treatment. *Id.* at 2114-15. A few months later, a clinical psychologist at the facility reported that Thomas was then competent to stand trial. *Id.* at 2115. The trial court asked defense counsel if they would make a further claim of incompetency, and Mr. Hagood declined. *Id.* at 2123. Thomas pleaded not guilty by reason of insanity to the indictment's single charge of capital murder. *Id.* at 2109-10.

B. Before voir dire began, the veniremen filled out a questionnaire, which included the following question:

> The Defendant in this case, Andre Thomas, and his ex-wife, Laura Boren Thomas, are of different racial backgrounds. Which of the following best reflects your feelings or opinions about people of different racial backgrounds marrying and/or having children:
>
> (___) I vigorously oppose people of different racial backgrounds marrying and/or having children and am not afraid to say so.

(___) I oppose people of different racial backgrounds marrying and/or having children, but I try to keep my feelings to myself.

(___) I do not oppose people of different racial backgrounds marrying or being together, but I do oppose them having children.

(___) I think people should be able to marry or be with anyone they wish.

Id. at 1036.

One venireman, Marty Ulmer, who was seated on the jury, selected the first option, reflecting "vigorous[] oppos[ition]" to interracial marriage. *Id.* at 1102. He explained in the available space: "I don't believe God intended for this." *Id.* Two other jurors, Barbara Armstrong and Charles William Copeland, selected the second option, indicating opposition, but that they kept their opinion on interracial marriage to themselves. *Id.* at 1054 (Armstrong), 1076-77 (Copeland). Armstrong explained that she believed such relationships were "harmful for the children involved because they do not have a specific race to belong to." *Id.* at 1054. Copeland explained that he believed "we should stay with our blood line." *Id.* at 1076-77.

The court and counsel for each side questioned Ulmer, Armstrong, and Copeland—and Ulmer was questioned specifically as to whether his views of interracial marriage would color his view of the case. The court and all counsel were satisfied with their commitments to hear the evidence, follow the law, and render an impartial verdict, and the defense did not challenge them for cause.[2] Pet. App. 114a-120a.

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[2] Another venireman likewise selected the second option on the questionnaire, was questioned by the court and counsel, gave

Defense counsel questioned Ulmer specifically about his questionnaire answer, and the following colloquy took place:

> Q: Well, how would—how do you feel about, if you are sitting on a case where the defendant or a defendant accused of capital murder was a black male, and the victim, his wife, was a white female.
>
> A: Well, I think—I think it's wrong to have those relationships, my view, but we are all human beings and God made every one of us. And, you know, as far as—I don't care if it is white/white, black/black, that don't matter to me. If you've done it, you are a human being, you have got to own up to your responsibility.
>
> Q: So, the color of anyone's skin would not have any impact or bearing upon your deliberations?
>
> A: No, not according to that, no.
>
> Q: Okay.
>
> A: Not whether they were guilty or innocent.
>
> Q: Would the race of either the defendant or the victim be something that you would take into consideration in determining, or considering, answering these special issues, or considering either the death penalty or life imprisonment?
>
> A: No, I wouldn't judge a man for murder or something like that according to something like that, no, I would not.

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satisfactory answers, and was accepted as an alternate without challenge for cause. Pet. App. 120a. She was dismissed before deliberations, and the Fifth Circuit correctly did not consider her in its analysis of this case. *Id.* at 12a.

Id. at 115a-116a. Again, both sides expressly refused to make a challenge for cause. *Id.* at 116a. The defense did not exercise a peremptory strike against any of these three jurors. *Id.* at 125a.

C. Since there was no real dispute that Thomas killed his victims, the trial focused on his defense—insanity. *See* Tex. Penal Code § 8.01(a) ("It is an affirmative defense to prosecution that, at the time of the conduct charged, the actor, as a result of severe mental disease or defect, did not know that his conduct was wrong."). The State argued that either (1) Thomas knew his conduct was wrong or (2) his insanity was not an effective defense because it was brought on by voluntary intoxication by alcohol, marijuana, and DXM. ROA.2143. *See* Tex. Penal Code § 8.04(a) ("Voluntary intoxication does not constitute a defense to the commission of crime."); *id.* at § 8.04(d) (". . . 'intoxication' means disturbance of mental or physical capacity resulting from the introduction of any substance into the body.").

The jury returned a guilty verdict and answered special issues resulting in a sentence of death. ROA.2110. The Texas Court of Criminal Appeals ("CCA"), the court of last resort for all criminal and habeas corpus matters in Texas, affirmed the conviction and sentence on direct appeal. *Thomas v. State*, No. AP-75,218, 2008 WL 4531976, at *1 (Tex. Crim. App. Oct. 8, 2008) (not designated for publication). Thomas did not petition this Court for a writ of certiorari.

II. State-Court Habeas Proceedings

While his direct appeal remained pending, Thomas filed an application for writ of habeas corpus in a Texas state court. Pet. App. 58a. Relevant to this proceeding, Thomas argued that the presence of jurors who opposed interracial marriage deprived him of a fair trial and

violated his Equal Protection rights, and that his counsel's failure to further question those jurors about their biases constituted ineffective assistance. Appellee's Brief, *Thomas v. Lumpkin*, No. 17-70002, at 14 (5th Cir. June 6, 2019).

The state trial court authored extensive findings of fact and conclusions of law and recommended to the CCA that relief be denied on the merits of each of Thomas's claims. ROA.2109-73. After conducting its own review of the record and of the trial court's findings and conclusions, the CCA adopted the trial court's recommendation and denied all relief. Pet. App. 291a.

III. Federal Habeas Proceedings

A. Finally, Thomas initiated the instant federal habeas proceeding. He raised 27 claims to relief, including the two listed above. ROA.33-35. In a lengthy memorandum and order, the district court denied all relief, finding no merit in any of Thomas's claims for relief, denied a certificate of appealability, and entered judgment for respondent. Pet. App. 57a-290a, ROA.2813. The district court also denied, ROA.2883-2898, Thomas's motion to amend the judgment, *id.* at 2814-2840.

Thomas filed a notice of appeal, *id.* at 2899, and moved for a certificate of appealability, which the Fifth Circuit granted on four issues—one of those issues encompassed the two questions now before this Court, Pet. App. 55a-56a. The Fifth Circuit issued a published opinion affirming the district court's denial of the petition for a writ of habeas corpus and judgment for respondent. Pet. App. 1a-50a.

B. The court began with the first question: whether racial bias deprived Thomas of a fair trial. Pet. App. 8a-19a. The court recognized, as this Court has, that Thomas "h[ad] the right to an impartial jury that c[ould]

view him without racial animus," *id.* at 14a (quoting *Georgia v. McCollum*, 505 U.S. 42, 58 (1992)), and that "racial prejudice is antithetical to the functioning of the jury system," *id.* (quoting *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 871 (2017)). But the Fifth Circuit also recognized, as this Court has, that any rule requiring elimination of any and all preconceived notions among jurors establishes an impossible standard. *Id.* at 14a-15a (citing *Irvin v. Dowd*, 366 U.S. 717, 723 (1961)). Instead, "[i]t is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin*, 366 U.S. at 723.

The Fifth Circuit looked to the state habeas court's resolution of the fair trial claim to determine whether it was unreasonable under AEDPA's deferential standard. 28 U.S.C. § 2254(d). In denying Thomas's fair trial claim, the Fifth Circuit reasoned that the state habeas court necessarily determined that each of the now-challenged jurors could set aside their biases and render a verdict on the evidence presented. Pet. App. 16a. It then held, based on each juror's answers in voir dire, that the state habeas court's implicit conclusion was not an "objectively unreasonable" application of this Court's precedent. *Id.* at 16a-18a. None of the jurors made an "unequivocal express[ion] that they could not sit as fair and impartial jurors," which would have required granting relief under Fifth Circuit precedent. *Id.* at 17a-18a (quoting *Virgil v. Dretke*, 446 F.3d 598, 613 (5th Cir. 2006)).

Judge Higginson dissented in part, Pet. App. 51a-54a. He emphasized that, as the majority recognized, Ulmer never retreated from his beliefs about interracial marriage. *Id.* at 53a-54a. Thus, Judge Higginson said, Ulmer should never have been seated, even though he stated he could set aside those beliefs. *Id.*

C. The Fifth Circuit turned second to Thomas's claim that his counsel were ineffective when they failed to further question the three jurors about their racial biases. Pet. App. 19a-29a. The court recognized the ultimate question is whether the state habeas court's conclusion that Thomas's counsel was not ineffective was objectively unreasonable. As to Ulmer, the Fifth Circuit had little trouble—counsel *did* question Ulmer about his answer to the questionnaire and elicited a commitment to faithfully hear evidence and apply the law. *Id.* at 20a-21a. Thus, Thomas failed to overcome the presumption that his counsel was effective, and the state habeas court's decision was not unreasonable under the "doubly deferential" AEDPA review. *Id.* at 21a (quoting *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011)).

Turning to Armstrong and Copeland, the Fifth Circuit recognized that "[g]eneric questions about juror impartiality may not expose specific attitudes or biases that can poison jury deliberations." *Id.* at 21a (quoting *Pena-Rodriguez*, 137 S. Ct. at 869). So the elicitation of commitments to decide the case on the evidence, without more, may not have fully developed all there was to know about those juror's potential biases. But, as this Court has explained and the Fifth Circuit emphasized, "more pointed questions could well exacerbate whatever prejudice might exist without substantially aiding in exposing it." *Id.* (quoting *Pena-Rodriguez*, 137 S. Ct. at 869 (internal quotation marks omitted)). Thus, the Fifth Circuit explained the difficulty for counsel in cases such as this becomes clear—and counsel's resolution of that difficulty is, like many tactical decisions made preparing for and in the heat of trial, owed great deference in the ineffective assistance analysis. See *id.* at 22a-23a.

The Fifth Circuit concluded the state habeas court was not objectively unreasonable in finding that Thomas's trial counsel were not ineffective. Specifically, the state trial court permissibly deferred to counsels' strategic choice not to intensify or exacerbate potential biases on the jury by asking further, pointed questions when those jurors all committed to hear the evidence and decide the case impartiality.

Thomas now seeks a writ of certiorari from this Court. This Court should deny that petition.

REASONS TO DENY CERTIORARI

AEDPA precludes relief unless the state habeas court's judgment "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). "[C]learly established Federal law" "refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Carey v. Musladin*, 549 U.S. 70, 74 (2006) (quoting *Williams v. Taylor*, 529 U.S. 362, 412 (2000)).

A decision is "contrary to" this Court's precedent if it rests on a "rule that contradicts the governing law set forth in [the Court's] cases," or involves "a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from [its] precedent." *Williams*, 529 U.S. at 405, 406. Under the "unreasonable application" prong, a decision must be "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

Moreover, "an *unreasonable* application of federal law is different from an *incorrect* application of federal

law." *Id.* at 101 (quoting *Williams*, 529 U.S. at 410). A state court's decision is unreasonable "if, and only if, it is so obvious that a clearly established rule applies to a given set of facts that there could be no 'fairminded disagreement' on the question." *White v. Woodall*, 572 U.S. 415, 427 (2014) (quoting *Richter*, 562 U.S. at 103). "The more general the rule, the more leeway [state] courts have in reaching outcomes in case-by-case determinations." *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004). And the more room there is for fairminded disagreement. *Renico v. Lett*, 559 U.S. 766, 776 (2010).

For claims of ineffective assistance of counsel, "[e]stablishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult." *Richter*, 562 U.S. at 105. Because "[t]he standards created by *Strickland* and § 2254(d) are both 'highly deferential,'" "when the two apply in tandem, review is 'doubly' so." *Id.* "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.*

I. The Fifth Circuit Correctly Concluded that Thomas's Fair Trial Claim Fails.

Thomas's fair trial claim is procedurally defaulted because the record clearly establishes—and there is no dispute that—his counsel failed to object to the seating of the jurors that he now challenges. That lack of an objection is fatal under AEDPA, leaving Thomas at most with an ineffective assistance of counsel claim related to the lack of an objection. Even if that were not the case, the Fifth Circuit correctly denied Thomas relief, as has every court that has considered the question.

A. Thomas's fair trial claim is procedurally defaulted.

1. A state prisoner's default of his federal claims in state court under an independent and adequate state procedural rule bars federal habeas review of those claims. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Here, Thomas procedurally defaulted his jury bias claim when he failed to object to the jurors in question at trial and failed to raise the issue on direct appeal. Texas's contemporaneous-objection rule, Tex. R. App. P 33.1(a)(1); *Montelongo v. State*, 623 S.W.3d 819, 822 (Tex. Crim. App. 2021), is an adequate and independent state procedural rule, *Cardenas v. Dretke*, 405 F.3d 244, 249 (5th Cir. 2005) (explaining that failure to object to the exclusion of a potential juror waives any error under Texas law and constitutes an adequate an independent state-law procedural bar); *see also Wainwright v. Sykes*, 433 U.S. 72, 86-87 (1997) (concluding that Florida's contemporaneous-objection rule was independent and adequate). Thus, the federal courts may not review this claim.

Thomas did not challenge, strike, or otherwise object to Ulmer, Armstrong, or Copeland, and the state habeas court found as such. Pet. App. 329a ("No objection was ever made by [Thomas] to the purported racial bias of any juror that was seated."). And he did not pursue that claim on direct appeal. *See generally* Appellant's Brief, *Thomas v. State*, No. AP-75,218, 2006 WL 3367650 (Tex. Crim. App. Sep. 29, 2006). Nor could he have, given his failure to object at trial. *Cardenas*, 405 F.3d at 249. Because of his failure to pursue this claim on direct appeal, the CCA did not pass on the question even though it issued a lengthy opinion affirming Thomas's conviction. *See Thomas v. State*, No. AP-75,218, 2008 WL 4531976,

at *1 (Tex. Crim. App. Oct. 8, 2008) (not designated for publication).

As a result, the state habeas court concluded, and clearly expressed, that such objections and any fair-trial claim based on those jurors were waived and barred. Pet. App. 375a ("[Thomas] did not object to those jurors on the grounds set out in [the fair trial claim]."); *id.* at 363a ("The failure of [Thomas], as defendant, to object at the trial, and to pursue vindication of a constitutional right of which he was put on notice on appeal, constitutes a waiver of the position he now asserts on a writ of habeas corpus." (internal citations and quotation marks omitted)). That the state habeas court also evaluated and reached conclusions on the merits of Thomas's jury bias claim is of no import. Rather, as long as the state court ruled on the procedural default, it suffices to bar review. *Coleman*, 501 U.S. at 733-34; *Cardenas*, 450 F.3d at 249.

Finally, Thomas cannot establish cause to excuse his procedural default. It is true that some procedural defaults can be overcome by a showing of cause and prejudice, and that ineffective assistance of counsel can constitute cause. But "[s]o long as a defendant is represented by counsel whose performance is not constitutionally ineffective . . . [there is] no inequity in requiring him to bear the risk of attorney error that results in a procedural default." *Coleman*, 501 U.S. at 752. Here, Thomas's trial counsel were not constitutionally ineffective in voir dire. *See infra* at 25-31. They simply made acceptable strategic decisions that did not fall below the recognized standard of attorney conduct and performance, at least not beyond fairminded disagreement. Thus, Thomas cannot be excused of his procedural default.

2. Although respondent did not raise procedural default in the district court, he did so before the Fifth

Circuit. Appellee's Brief, *Thomas v. Lumpkin*, No. 17-70002, at 14-15 (5th Cir. June 6, 2019). Failure to raise the issue in the district court does not necessarily result in waiver. Rather, the impact of that failure depends on the circuit. For example, this Court has left open the question of whether a circuit court may raise procedural default sua sponte. *Day v. McDonough*, 547 U.S. 198, 206 (2006) (explaining that "the Courts of Appeals have unanimously held that, in appropriate circumstances, courts, on their own initiative, may raise a petitioner's procedural default").

In the Fifth Circuit, "procedural default is not subject to the customary doctrine of waiver." *Coleman v. Goodwin*, 833 F.3d 537, 541 (5th Cir. 2016). Instead, "[a] state's careless or inadvertent failure to brief procedural default does not waive the argument; only a purposeful and deliberate decision to forego the defense will do so." *Id.* There is no indication or evidence that respondent purposefully waived procedural default, let alone any portion of the record to reflect an explicit relinquishment of the defense. Therefore, the Fifth Circuit could have, and still could on any remand, consider procedural default and resolve Thomas's jury bias claim solely on that ground.

It is of no consequence that Fifth Circuit chose not to address procedural default below. Should this Court remand the case, either the district court or the Fifth Circuit could take up procedural default as an alternative ground to dismiss Thomas's jury bias claim. Thus, this Court's review on this claim is unwarranted.

B. Thomas's fair trial claim fails on the merits.

1. The Fifth Circuit correctly determined that Thomas's claim fails.

a. Even if Thomas's jury bias claim were not procedurally defaulted, the Fifth Circuit correctly denied relief.

As the Fifth Circuit recognized, "blatant racial prejudice is antithetical to the functioning of our justice system." Pet. App. 14a (citing *Pena-Rodriguez*, 137 S. Ct. at 871. And "[a]ny juror who 'the defendant has specific reason to believe would be incapable of confronting and suppressing their racism' should be removed from the jury." Pet. App. 14a (citing *Georgia v. McCollum*, 505 U.S. 42, 58 (1992)).

At the same time, as this Court has explained, and the Fifth Circuit recounted, Pet. App. 14a-15a, "[t]o hold that the mere existence of any preconceived notion as to the guilt or innocence of the accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard." *Irvin v. Dowd*, 366 U.S. 717, 723 (1961). "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Id.* Each of the challenged jurors affirmed that they could so here.

The state court found "[t]here is no evidence that the jury' decision was racially motivated." Pet. App. 15a, 329a. The state court also concluded that Thomas "failed to present by a preponderance of the evidence any proof of purposeful prosecution or jury discrimination in his particular case." *Id.* at 372a-73a. The Fifth Circuit recognized that "a necessary implicit finding within the state court's explicit finding is that no juror would base his decision on race rather than on the evidence

presented." Pet. App. 16a. Put another way, the state court at least implicitly determined that "any bias of a juror could be set aside in determining guilt or a punishment." Pet. App. 16a. And because Thomas's fair trial claim was procedurally defaulted in any event, as the state court clearly recognized, there was no need for it to go further.

b. The record amply supports the Fifth Circuit's conclusion that the state court's determination was not an unreasonable application of this Court's precedent. Each of the three challenged jurors affirmed—whether under questioning from Thomas's counsel, the trial court, or both—that they could reach an unbiased result in the case based on the evidence presented to them.

"The facts of this case reveal that the trial court conducted a lengthy voir dire" where "[e]ach prospective juror was questioned individually" and "[t]he attorneys were permitted to question them about racial bias." Pet. App. 114a.

First, both the trial court and defense counsel questioned Marty Glenn Ulmer. Ulmer was specifically asked by defense counsel "if 'the color of anyone's skin would . . . have any impact or bearing upon his deliberations.'" Pet. App. 16a; *see also* Pet. App. 115a-116a. He responded "no." Pet. App. 16a. After saying that he believed interracial relationships were wrong, he also stated that "we are all human beings and God made everyone of us. And, you know, as far as—I don't care if it's white/white, black/black, that don't matter to me." Pet. App. 115a-116a. When asked by defense counsel whether "the race of either the defendant or the victim [would] be something that you would take into consideration in determining, or considering, answering these especial issues, or considering either the death penalty or life

imprisonment," Ulmer answered "[n]o, I wouldn't judge a man for murder or something like that according to something like that, no, I would not." *Id.* at 116a. "Following this exchange, both the State and the defense specified that they were not challenging Ulmer for cause and were accepting him as a juror." *Id.*

The next juror questioned was Barbara Armstrong. The trial court judge questioned her extensively to determine whether she could be impartial, as did defense counsel. While not specifically asking about her views on interracial relationships, the trial court repeatedly elicited assent from Armstrong that she could "listen to the evidence in this case[,] . . . make up [her] mind based on that evidence," and set aside "whatever [she had] heard before, whether from friends, or heard about it on the news, or read it in the newspaper." *Id.* at 116a-117a. Defense counsel asked Armstrong whether she could "listen to the evidence and render a verdict" to which Armstrong replied "I'm not coming in here with my mind made up or, anything. I have no idea. Yes, I would listen to all of the evidence." *Id.* at 118a. After a lengthy voir dire, "[b]oth sides . . . chose to forego a challenge to Armstrong, and both sides stipulated that they would accept her as a juror. *Id.* at 118a.

The third juror questioned was Christopher Copeland. The trial court asked Copeland whether "if chosen as a juror," he could "listen to the evidence from the witness stand and make up [his] mind based solely upon the evidence that [he] hear[d]" and Copeland responded "[y]es." *Id.* at 119a. In addition, Copeland told prosecutors that "[y]ou've got to prove he did it. . . . that's what a jury does isn't it? They listen to both sides and they make up their mind." *Id.* at 119a-120a. When asked whether he had made up his mind, Copeland

answered "[n]o." *Id.* at 120a. Copeland also informed defense counsel that "he would not make up his mind until he hear[d] both sides of the story" and "[n]either the State nor the defense challenged him for cause, and both accepted him as a juror." *Id.*

Thus, each of the challenged jurors stated that they could decide the case based on the facts and evidence presented to them—and not based on any bias.

The Fifth Circuit held, as to Ulmer, that "the state court found 'no evidence that the jury's decision was racially motivated'" and that "a reasonable understanding of that finding [is] that Ulmer's answers . . . were clear that his moral judgment would not affect his fact finding." *Id.* at 16a-17a. As to Armstrong and Copeland, the Fifth Circuit explained that in view of their affirmation that they could decide the case in an unbiased manner, it could not say that "the state *habeas* court was objectively unreasonable in concluding that Armstrong and Copeland decided the case solely on the evidence presented." *Id.* at 18a.

c. The Fifth Circuit's analysis conforms with this Court's precedent. As this Court has made clear, "[t]o hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard." *Irvin*, 366 U.S. at 723. Instead, "[i]t is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Id.* As the state court concluded—and as the record shows—each juror at issue said they could do just that in voir dire notwithstanding the way they answered the questionnaire.

And while this Court has held that seating a juror who cannot be impartial over the defendant's objection requires reversal, *e.g.*, *Ross v. Oklahoma*, 487 U.S. 81, 85 (1988), it has not held that a juror's expression of some degree of racial bias constitutes a showing of partiality or amounts to structural error that requires reversal even without an objection from the defendant or a showing of harm, *see Austin v. Davis*, 876 F.3d 757, 803 (5th Cir. 2017) (Owen, J., concurring) ("The Supreme Court has never held that juror bias is structural error requiring automatic reversal."). While the jury questionnaire reveals some degree of bias, each of the jurors in question also affirmed that they could set biases aside and determine the outcome based on the facts presented at trial and the law.

Thomas has identified no precedent of this Court holding that a juror's opposition to interracial marriage, standing alone, necessarily deprives the defendant of a fair trial. Indeed, this Court's recent decisions involving a juror's expression of racial bias confirm as much.

In *Tharpe v. Sellers*, 138 S. Ct. 545 (2018) (per curiam), this Court considered a procedurally defaulted claim that one of the jurors who convicted the petitioner was racially biased. The federal district court held that Tharpe could not overcome the procedural default "because he had failed to produce any clear and convincing evidence contradicting the state court's determination that [the individual]'s presence on the jury did not prejudice him." *Id.* at 545. The Eleventh Circuit denied Tharpe's request for a certificate of appealability because he failed "to demonstrate that [the challenged juror]'s behavior 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Id.* at 546

(quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)).

This Court held that Tharpe was entitled to a COA, but it did not disagree that his claim of juror bias required proof of prejudice, specifically, that the biased juror voted to impose the death penalty because of Tharpe's race. This Court treated the state court's contrary conclusion as a "factual determination [that] is binding on federal courts, including this Court, in the absence of clear and convincing evidence to the contrary." *Id.* (citing 28 U.S.C. § 2254(e)(1)). Reaffirming the requirement that Tharpe show prejudice, this Court held that a "remarkable affidavit" obtained from one juror after trial "present[ed] a strong factual basis for the argument that Tharpe's race affected [that juror's] vote for a death verdict." *Id.* Based on that affidavit, it concluded that jurists of reason could debate whether Tharpe could satisfy section 2254(e)(1)—"whether Tharpe has shown by clear and convincing evidence that the state court's factual determination was wrong." *Id.*

This Court's decision in *Pena-Rodriguez* likewise indicates that a juror's racial bias must affect the verdict to warrant relief. There, testimony indicated that a juror not only "deploy[ed] a dangerous racial stereotype to conclude petitioner was guilty and his alibi witness should not be believed, but he also encouraged other jurors to join him in convicting on that basis." 137 S. Ct. at 870. This Court recognized an exception to Federal Rule of Evidence 606(b)(1), which generally prohibits the use of juror testimony to impeach the verdict, "when, after the jury is discharged, a juror comes forward with compelling evidence that another juror made clear and explicit statements indicating that racial animus was a significant motivating factor in his or her vote to convict."

137 S. Ct. at 861. This Court expressly declined to "decide the appropriate standard for determining when evidence of racial bias is sufficient to require that the verdict be set aside and a new trial be granted." *Id.* at 870-71 (identifying as potential standards "whether racial bias 'pervaded the jury room'" or whether "[o]ne racist juror would be enough" (quoting *Shillcutt v. Gagnon*, 827 F.2d 1155, 1159 (7th Cir. 1987))). But it held that in order to "justify setting aside the no-impeachment bar to allow further judicial inquiry. . . . the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict." *Id.* at 869.

These recent decisions are consistent with this Court's longstanding precedent explaining that in "a federal habeas corpus case in which the partiality of an individual juror is placed in issue" the "question is . . . plainly one of historical fact: did a juror swear that he could set aside any opinion he might hold and decide the case on evidence, and should the juror's protestation of impartiality have been believed." *Patton v. Yount*, 467 U.S. 1025, 1036 (1984).

Here, as the state court concluded, no evidence exists to suggest the jurors' assertions of impartiality should be questioned. And Thomas points to no evidence to the contrary. To the extent the record illuminates the jury's decision-making process, it provides no hint that any juror based his or her decision on opposition to interracial marriage.

To the contrary, it suggests that Thomas's lack of remorse and the horrific facts of the crime lead to the jury's verdict. Defense counsel made a proffer in support of Thomas's motion for a new trial, that the jury foreman would testify that the jurors wanted the defense to give them something to "hang their hat on" and that one of

those things would have been the expression of "true remorse." ROA.2127. The motion for a new trial itself expressly contended that the jury's verdict was determined by the horrific facts of the crime: "The jurors indicated that once they had seen the photographs of the children in this case and the crime scene videotape regarding the deceased individuals, that the jury had made . . . up its mind that not only would they convict the Defendant but answer these special issues in a way that would require the trial court to impose a death sentence upon the Defendant." 5.CR.1704.

2. Thomas's counterarguments do not disturb this conclusion.

Thomas raises two arguments, neither of which is availing under the demanding AEDPA standard.

First, Thomas suggests (at 22) that the Fifth Circuit erred by applying the standard this Court set out in *Richter*, requiring courts to deny relief under AEDPA "if there was a reasonable justification for the state court's decision," 562 U.S. at 109, rather than the standard set out in *Wilson v. Sellers*, 138 S. Ct. 1188, 1195-97 (2011), which requires federal habeas courts to "look through" to the last reasoned state court decision.

But Thomas aims at a straw man. The Fifth Circuit's opinion did not invent a reason upon which the state court might have denied relief but instead relied on what it determined was "[a] necessary implicit finding within the state court's explicit finding" that "any bias of a juror could be set aside in determining guilt or a punishment" for Thomas. Pet. App. 16a. Thus, rather than speculating about reasons the state court might have denied habeas relief, the Fifth Circuit looked directly to that court's opinion and based its denial on reasons fairly encompassed by it. The Fifth Circuit did not err in doing so. To

conclude otherwise would be a "mischaracterization of the state-court opinion" by reading it too narrowly. *Dunn v. Reeves*, 141 S. Ct. 2405, 2412 (2021) (per curiam). And, again, insofar as the state court did not do more, it is because it expressly recognized that Thomas's fair trial claim was procedurally barred under Texas law by his failure to object to the relevant jurors.

Second, and perhaps recognizing as much, Thomas contends that the state court's reasoning would still be unreasonable. Thomas identifies (at 26-27) three of this Court's cases that he believes the state court applied unreasonably: *Parker v. Gladden*, 385 U.S. 363, 366 (1966) (per curiam); *Irvin*, 366 U.S. at 722; and *Turner v. Murray*, 476 U.S. 28, 35 (1986). But none of these precedents help Thomas.

In *Parker*, the question was whether statements by "a court bailiff assigned to shepherd the sequestered jury"—including "[o]h that wicked fellow . . . he is guilty" and "[i]f there is anything wrong (in finding petitioner guilty) the Supreme Court will correct it"—that were overheard by jurors violated the right to an impartial jury. 385 U.S. at 364-65. This Court determined that these statements violated "the rights of confrontation and cross-examination." *Id.* at 365. Further, this Court determined that prejudice arose from the bailiff's statement—in part because "one of the jurors testified that she was prejudiced by the statements." *Id.* at 470 (footnote omitted). Thomas's petition before this Court does not even raise analogous issues. *Cf. Richter*, 562 U.S. at 103 (an unreasonable application is one "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement").

In *Irvin*, the question was whether "continued adverse publicity" that "caused a sustained excitement and fostered a strong prejudice among the people of Gibson County" deprived the defendant of a fair trial. 366 U.S. at 726. Where that publicity caused almost 90 percent of prospective jurors—including "[e]ight out of the 12" jurors eventually seated—to think "petitioner was guilty" before trial, this Court concluded that "the finding of impartiality does not meet constitutional standards." *Id.* at 727-28. Again, the claims Thomas presents to this Court again do not even resemble in issue addressed in *Irvin*.

In *Turner*, the question was "whether the trial judge committed reversible error at *voir dire* by refusing petitioner's request to question prospective jurors on racial prejudice." 476 U.S. at 29. This Court held "that a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias." *Id.* at 36-37. But this Court also made clear that "the trial judge retains discretion as to the form and number of questions on the subject, including the decision whether to question the venire individually or collectively" and that "a defendant cannot complain of a judge's failure to question the venire on racial prejudice unless the defendant has specifically requested such an inquiry." *Id.* at 37. There is no dispute that this rule was not violated in this case. Thomas's counsel questioned Ulmer at length about racial bias, *supra* at 5, 16-17, and made a strategic decision not to question Armstrong and Copeland, *infra* at 25-29. The state court's determination was not an unreasonable application of *Turner*.

II. The Fifth Circuit Correctly Concluded That Thomas's *Strickland* Claim fails.

The Fifth Circuit correctly concluded that Thomas's *Strickland* claim fails. Under AEDPA, federal habeas review of *Strickland* claims is "doubly" deferential. *Richter*, 562 U.S. at 105. This is because federal courts owe deference "to both [Thomas's] counsel *and* the state court." *Reeves*, 141 S. Ct. at 2410. "As to counsel," this Court has "often explained that strategic decisions . . . are entitled to a 'strong presumption' of reasonableness." *Id.* (quoting *Richter*, 562 U.S. at 104).

A. Thomas's *Strickland* claim fails on the merits.

1. The Fifth Circuit concluded that the state court did not unreasonably apply this Court's precedent as to any of the challenged jurors. First, the Fifth Circuit noted that "[c]ertainly, the jury was questioned about racial prejudice in the context of this case" because "[a]ll prospective jurors were asked about racial bias, at least in the questionnaires." Pet. App. 20a. Thus, "[t]he relevant question is whether defense counsel should have probed further during *voir dire* any juror whose written answers were concerning." *Id.*

As the Fifth Circuit further explained "[d]efense counsel questioned Ulmer specifically on his beliefs about interracial marriage." *Id.* In view of both that questioning and Ulmer's answers, the court had no trouble concluding that "the questioning of Ulmer was sufficient, and the state *habeas* court was not objectively unreasonable when it concluded that Thomas did not rebut the presumption of counsel's effectiveness as to Ulmer." *Id.* at 21a.

The Fifth Circuit also concluded that the state court's determination as to Copeland and Armstrong was not unreasonable. In reaching this conclusion, the Fifth

Circuit evaluated competing affidavits provided by defense counsel to both Thomas and the State. *Id.* at 23a.

Those affidavits show that Thomas's trial counsel had strategic reasons for declining to press harder on issues of racial bias as to Copeland and Armstrong. His lead trial counsel, R.J. Hagood, stated:

> Strategically, I would never ask pointed questions regarding racial bias from a juror without a real basis to do so. *Voir dire* can be delicate in that you do not want to alienate a juror who may end up on the jury. Accusing someone of racism is a good way to do that. Nona Dodson had suggested several questions to pose to jurors. I followed some of her [advice] which, based on many years as a trial attorney, I believed would be useful. I did not take all of her suggestions. In fact, I found some of those questions offensive and inappropriate to propound to a rural jury. I cannot recall any questions suggested by Ms. Dodson that I outright refused to ask. . . . For those jurors who expressed some problem with interracial relationships, either [co-counsel] Ms. Peterson or I questioned them to the extent necessary for us to request a strike for cause or make a decision to use a strike against them. Often time, there were much worse jurors upon whom we exercised our strikes.

Id. at 24a (alterations in original). Moreover, Hagood stated that he "had tried many cases in Grayson County, Texas, in which his clients were 'black defendants found not guilty by all-white' juries." *Id.* at 25a. The Fifth Circuit concluded that "Hagood was experienced with dealing with . . . concerns" like those presented here, and his "decisions were strategic attempts to avoid alienating potential jurors based on his trial experience in rural

areas like Grayson County." *Id.* As the lower court further explained, the difference in the questioning for Ulmer and Copeland and Armstrong buttresses the conclusion that Thomas's trial counsel made a strategic choice. *Id.* at 25a-26a. Ulmer—who had expressed stronger opposition to interracial marriage—was asked extensively about his views and whether he could render an impartial verdict. *Id.* at 26a. Copeland and Armstrong—who indicated less strong views and that they preferred to keep those views to themselves—received less questioning. *Id.*

In view of these facts and after surveying its own precedents and cases from other courts, the Fifth Circuit concluded that "[i]t was not objectively unreasonable for the state *habeas* court to hold that defense counsel complied with *Strickland*." *Id.* at 29a.

2. This conclusion fits well within this Court's precedent on AEDPA review. Applying *Strickland*, the state court rejected Thomas's claim that trial counsel rendered ineffective assistance during voir dire, concluding that Thomas, "has failed to overcome the presumption that trial counsel was effective during voir dire questioning" and that Thomas "has not demonstrated that his counsel's performance fell below a reasonable objective standard, and he has not demonstrated that any alleged error prejudiced his defense." *Id.* at 373a. These conclusions are sufficient because, at a minimum, reasonable jurists could disagree whether Thomas failed to overcome the strong presumption that counsel rendered adequate assistance.

Under *Strickland*, counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Burt v. Titlow*, 571 U.S. 12, 22 (2013)

(quoting *Strickland v. Washington*, 466 U.S. 668, 690 (1984)). When a *Strickland* claim is based on "general, fact-driven standards," deference to the state court's decision is "near its apex." *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2560 (2018) (per curiam). Because Thomas's trial counsel here testified that they made strategic decisions with regard to voir dire about racial bias, those decisions are entitled to a "strong presumption" of deference. *Reeves*, 141 S. Ct. at 2410.

As discussed above, and as the Fifth Circuit concluded, trial counsel made strategic decisions based on their experience trying cases in Grayson County, Texas. At a minimum, reasonable jurists could disagree whether those strategic choices were reasonable, notwithstanding Thomas's habeas counsel's disagreement with them.

Moreover, the record shows that each of the challenged jurors gave some reason to believe that they would be favorable to the defense. Ulmer's voir dire testimony indicated that he might be receptive to Thomas's insanity defense. He stated: "I'd have a hard time sentencing a man to death if there was something wrong with him. I mean, he may not—he probably needs to be put up somewhere for the rest of his life, but I don't think he needs to be put to death, I feel like that would be wrong. I couldn't do it." 16.RR.53.

Likewise, Armstrong stated on her questionnaire that Thomas "murdered his family because he was insane," ROA.1051, and she was aware that he "pulled out his eye while in jail," ROA.1052. And when asked to name "two women who are publicly known and whom you admire or respect, Copeland wrote "Bobbie Peterson," Thomas's second chair trial counsel, "[b]ecause she is the [b]est." ROA.1070. Thus, affirmative evidence indicating

that each of the challenged jurors might be favorable to the defense provided a reasonable basis—combined with each juror's attestation that they could serve impartially—to make a strategic decision not to strike them from the jury.

If that were not enough, Thomas must also demonstrate prejudice under *Strickland*—which requires him to show "a reasonable probability that, absent the errors" the outcome of his trial would have been different—to succeed on this claim. *Strickland*, 466 U.S. at 695. The "likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112.

While the Fifth Circuit did not pass on prejudice, Thomas cannot show a substantial likelihood that he would not have been convicted or sentenced to death if the jurors he challenges had been excluded. Thomas was not convicted or sentenced because he had an interracial marriage—but because he murdered his wife and two young children by stabbing them to death and cutting their hearts out. His guilt was uncontested, and once his insanity defense failed, the gruesome nature of the murders he committed resulted in a sentence of death. Because evidence of prejudice is required, and because he offers none, Thomas cannot show that the state court's rejection of his ineffective assistance claim involved an unreasonable application of *Strickland*.

B. Thomas's counterarguments are unavailing.

Thomas offers four arguments to the contrary, none of which show an entitlement to relief.

First, Thomas argues (at 31-32) that the Fifth Circuit fundamentally misapprehended this Court's holding in *Turner*. But it is Thomas who misreads *Turner*. The holding of *Turner* is clear: "We hold that a capital defendant accused of an interracial crime is entitled to have

prospective jurors informed of the race of the victim and questioned on the issue of racial bias." 476 U.S. at 36-37. This Court emphasized that this rule is "minimally intrusive" because "the trial judge retains discretion as to the form and number of questions on the subject, including the decision whether to question the venire individually or collectively." *Id.* at 37. And this Court also emphasized that "a defendant cannot complain of a judge's failure to question the venire on racial prejudice unless the defendant has specifically requested such an inquiry." *Id.*

Insofar as Thomas seeks to expand on *Turner's* holding, he seeks to rely on law not clearly established under AEDPA. That is because "[t]hat statutory phrase refers to the holdings, as opposed to the dicta, of this Court's decisions." *Williams,* 529 U.S. at 412. And the Fifth Circuit was correct to note that, as did not occur in *Turner*, all jurors were given questionnaires about racial bias and Thomas's counsel was able to ask all of the questions they felt strategically appropriate at voir dire.

Second, Thomas contends (at 33-34) that the Fifth Circuit's treatment of *Turner* is inconsistent with *Wiggins v. Smith*, 539 U.S. 510 (2003), because counsel should have conducted additional investigation. Thomas argues (at 34-35) that "the Fifth Circuit offered its own speculation about why trial counsel did not ask any questions of Copeland and Armstrong."

But this contention is belied by the record. As explained above, Thomas's trial counsel made a strategic decision as to how to conduct voir dire based on long experience trying cases in Grayson County, Texas. They also affirmed that they questioned potential jurors "to the extent necessary . . . to request a strike for cause or make a decision to use a strike against them." *Id.* at 34a. That Thomas's habeas counsel now believes more was

required does not mean that the state court unreasonably applied this Court's precedent in concluding otherwise under the doubly deferential standard that govern *Strickland* claims under AEDPA.

Third, Thomas argues (at 36) that he need not show prejudice because the error here was structural. But this Court has not held that juror bias automatically constitutes structural error. *See, e.g., Austin*, 876 F.3d at 803 (Owen, J., concurring) ("The Supreme Court has never held that juror bias is structural error requiring automatic reversal."). Tellingly, Thomas relies primarily on a Fifth Circuit case, *Virgil*, 446 F.3d at 614, and an Ohio Supreme Court case, *State v. Bates*, 149 N.E.3d 475, 485 (Ohio 2020), for this proposition. Pet. 36. But of course these cases do not clearly establish federal law, as required under AEDPA. *Williams*, 529 U.S. at 412.

Finally, Thomas contends (at 36-37) that he "could also establish that confidence in his death sentence is undermined if that were the standard." But to suggest he could do something is not to say that he has done so; rather it concedes the opposite. Such contention cannot suffice to show prejudice.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2021