No. 21-5095

In the Supreme Court of the United States

MELISSA ELIZABETH LUCIO, 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

Two-year-old Mariah Alvarez suffered a fatal head injury at the hands of her mother, the petitioner in this case. During a videotaped interrogation, petitioner admitted beating Mariah, biting her, and pinching her vagina, but denied the fatal head injury.

The trial court prohibited petitioner from attacking the veracity of her own statements with expert testimony from a psychologist and a social worker. Petitioner did not argue that excluding her experts violated her right to present a complete defense. *See Crane v. Kentucky*, 476 U.S. 683 (1986), *Chambers v. Mississippi*, 410 U.S. 284 (1973). On direct appeal, petitioner argued that excluding her experts violated *Crane* by precluding arguments that she confessed involuntarily. The Texas Court of Criminal Appeals (CCA) disagreed. In state-habeas proceedings, petitioner raised another complete-defense claim disclaiming *Crane*, instead arguing that the exclusion precluded a defense that she lacked the propensity for abuse. The CCA denied relief.

The district court denied federal-habeas relief. Applying the Antiterrorism and Effective Death Penalty Act (AEDPA), the en banc Fifth Circuit affirmed the judgment. A majority agreed that "current, clearly established Supreme Court authority" precluded the court from rejecting the state-court result. Pet. App. 40a. The question presented is:

> Whether AEDPA's relitigation bar, 28 U.S.C. § 2254(d)(1), precludes relief on petitioner's claim that the state trial court's exclusion of guilt-phase testimony from two credibility experts violated the right to present a complete defense because the state-court adjudication of that claim did not unreasonably apply clearly established federal law?

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INTRODUCTION

The Court should reject petitioner's attempt to relitigate a claim in violation of AEDPA. Petitioner contends that excluding guilt-stage testimony from a psychiatrist and a social worker about her purportedly false confession violated petitioner's right to present a complete defense. This Court has recognized a general right to present a complete defense. But this Court has not sufficiently established the contours of that right to render the state court's rejection of petitioner's claim *unreasonable*. AEDPA precludes relief because petitioner identifies no "error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). There is no circuit split to resolve, no misapplication of AEDPA to correct, and no way to address the question presented without numerous vehicle problems.

STATEMENT

1. Petitioner's two-year-old daughter Mariah was taken to the ER on Saturday, February 17, 2007, and pronounced dead shortly thereafter. R.14812-13.[1] Paramedics found Mariah unattended on the living-room floor of the home petitioner shared with her husband Robert Alvarez. R.14922-23, 14936-37, 14981-82. Petitioner said Mariah had fallen down some stairs. R.14924. Mariah's body showed severe abuse. She was dehydrated, her body covered with bruises in various stages of healing on her torso, arms, buttocks, and face. R.14813-16. There was a bite on her back. R.14815-16. Mariah's arm was broken a week or two earlier. R.15067. Mariah had missing hair from being pulled out. R.15051. This was the "absolute worst" child-abuse case Mariah's ER doctor had seen in 30 years. R.14821. Mariah died from "blunt force head trauma." R.15059.

Petitioner waived *Miranda* rights and was questioned by investigators in a videotaped interview. R.14773; R.8101.[2] Petitioner claimed that Mariah fell down stairs on Thursday night. R.8102-03. Initially, petitioner denied knowing how Mariah became so badly bruised, suggesting her older children might be responsible. R.8101-176.

Texas Ranger Victor Escalon began interviewing petitioner. R.8177.[3] Escalon eventually asked, "Who did it?" Petitioner responded, "I did." R.8183. Petitioner admitted spanking Mariah, R.8187, biting her, R.8209, and pinching her vagina, R.8205. "[N]obody else would hit her." R.8189. She denied hitting Mariah's head. R.8187; R.8227. As for the bite,

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[1] *R.*_ represents the Fifth Circuit record on appeal.

[2] The interview video was admitted as State's Exhibits 3, 4, and 5. A transcription appears at R.8099-231. The video shows several breaks in the questioning, which petitioner used to rest.

[3] The record occasionally names Escalon as "Escalante."

two weeks before Mariah's death, petitioner grew frustrated and "placed [her] mouth over [Mariah's] back and bit her." R.8222-23. Petitioner demonstrated on a doll how she bit and spanked Mariah. R.8221-28.

Later, while petitioner was being transported for a dental mold, petitioner called her sister. The transporting officer heard petitioner say, "Don't blame Robert. This was me. I did it." R.14991.

A grand jury indicted petitioner for capital murder. R.7664.

2. At trial, petitioner's interview was played for the jury. R.14796. Escalon testified that he observed petitioner to "try to get a better idea" about interviewing her. R.14951. Asked to describe petitioner's demeanor, Escalon testified that "she was not making eye cont[]act," "had her head down," and had a "slouched appearance." R.14952. This made Escalon believe that "she did something," R.14952, but was "hiding the truth," R.14953. The defense did not object.

The defense presented testimony from petitioner's sister, who testified about the phone call. She denied that petitioner said, "I did it." R.15203. Petitioner had said, "I would spank the kids." R.15203. She denied that petitioner abused Mariah and testified that petitioner "never disciplined her children." R.15200.

The jury also heard about Mariah's injuries. The State presented Dr. Norma Jean Farley, who performed Mariah's autopsy. R.15047. Mariah died from "blunt force head trauma," not falling down stairs. R.15059, 15070-71, 15091-94. The ER doctor who treated Mariah relayed that this was the "absolute worst" case of child abuse he had seen. R.14821. In rebuttal, the defense presented Dr. Jose Kuri, who testified that Mariah could have died from a fall or being "[h]it by a strong force." R.15193-94.

The defense proposed two more expert witnesses, Norma Villanueva and Dr. John Pinkerman. The defense offered Villanueva, a licensed clinical social worker, on "why [petitioner] . . . would have given police officer[s] information in [her] statement that was not correct." R.15233. The defense offered Villanueva as an expert "about the body language of [petitioner] during her video statement," and "what's happened to [petitioner] and the authorities with Child Protective Services and how that has a bearing on [petitioner]." R.15228. Villanueva intended to opine about what petitioner was thinking during the video and whether petitioner was telling the truth based on her body language. R.15236-38.

Under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), the trial court held a hearing to determine whether Villanueva was qualified as an expert body-language interpreter. Villanueva testified that she was "not a specialist in that area," had "no license specifically for the interpretation of body language," and had written no treatises or papers on it. R.15239-40. The trial court excluded Villanueva as unqualified on body language, although she was "qualified on the issue of mitigation." R.15242. Defense counsel complained that Escalon testified about petitioner's body language, but the court explained that Escalon interpreted petitioner's body language in approaching her to elicit a statement, whereas Villanueva professed expertise on the statement's veracity. R.15242. Villanueva was not "an expert as to why that statement is or is not true." R.15242.

The defense proffered Pinkerman on petitioner's background and "psychological functioning." R.15301. Defense counsel said Pinkerman would testify about petitioner's "propensity for violence," and "tak[ing] blame for everything that goes on in the family" because she suffered from battered woman syndrome. R.4751. Because petitioner denied "having

anything to do with" Mariah's death, the court concluded that Pinkerman's opinion did not "go[] to the guilt or innocence." R.4752.

To preserve the issue, counsel made an offer of proof on the record. In it, Pinkerman did not mention battered-woman syndrome or petitioner assuming blame for things she did not do. R.15293. Nor did Pinkerman opine on the credibility of petitioner's statements. *See* R.15301. Nor did Pinkerman's expert report mention battered woman syndrome or blame-taking. *See* R.5387-99. As Pinkerman's state-habeas affidavit later stated, the issue was "never raised" at trial. R.8975.

The State asked jurors to infer from the abuse that petitioner inflicted the fatal injury, that denials of striking Mariah's head were not credible, and that the evidence refuted an accidental fall. R.15345. The defense emphasized that petitioner admitted abusing but not killing Mariah. R.15331. Petitioner was convicted. R.7678.

3. Villanueva and Pinkerman testified during the punishment phase. Villanueva "was hired to do a social history and look through CPS records." R.15616. She saw petitioner's appearance during the interview as "a classic symptom of individuals that are abused" and of a battered woman. R.15573-74. Asked to explain "battered woman syndrome," Villanueva referred briefly to "a lot of research" without elaboration. R.15574-75. Villanueva "did not interpret body language," R.15626, and disclaimed such expertise, R.15605. Pinkerman was hired to "appear as a mitigator." R.15657. He disclaimed concluding that petitioner had battered woman syndrome. R.15710.

Based on the jury's answers to the punishment-phase special issues, the trial court sentenced petitioner to death. R.7678.

4. On appeal, petitioner claimed that the trial court erred in excluding guilt-phase testimony from Villanueva and Pinkerman, citing *Rock v. Arkansas*, 483 U.S. 44 (1987), and *Crane*, R.10841, R.10844. According to petitioner,

> [t]he defendant has a constitutional right to present evidence before the jury as to the circumstances under which his confession is taken. *Crane v. Kentucky*, . . . *Crane* deals with circumstances like how many policemen were there, how big the room was, how long the questioning lasted, etc. But the principle has wider application. The reason the jury w[as] entitled to know about the circumstances under which the statement was given [was] so that they could assess the voluntariness of the statement and so that they could use evidence of circumstances and their conclusion on voluntariness to follow the judge's instructions to disregard the statement unless they were convinced beyond a reasonable doubt that the statement was voluntary.

R.10841; R.10844-45. Petitioner argued that Villanueva and Pinkerman would have offered "critical evidence" necessary for a fair trial. R.10841; R.10844.

The CCA denied relief because petitioner failed to preserve her claim, the trial court did not abuse its discretion by excluding the experts, and any error was harmless. *Lucio v. State*, 351 S.W.3d 878, 900-02 (Tex. Crim. App. 2011). Petitioner's claim about what the experts' "testimony would have been does not comport with [their] proffered testimony at trial" or with counsel's description thereof. *Id.* at 900, 902. The CCA affirmed the conviction and sentence. *Id.* at 910. This Court denied certiorari. *Lucio v. Texas*, 566 U.S. 1036 (2012).

5. In her state-habeas application, petitioner claimed that the "trial court deprived [her] of the constitutional right to present a complete defense when it excluded the testimony of defense experts during the guilt/innocence phase of trial." R.8029. Petitioner distinguished this claim from her direct-appeal claim:

> Counsel distinguishes the claim raised in the instant proceeding from the claim raised on direct appeal that the trial court abused its discretion by preventing Melissa from presenting evidence regarding the circumstances under which her confession was taken. *See* Direct Appeal Brief (citing *Crane* . . .) .

> The instant issue goes to the core of the case—whether Melissa was likely to have engaged in ongoing abuse of Mariah.

R.8029 n.36.

After disclaiming *Crane*, petitioner stated that a complete defense "is violated by the exclusion of evidence pursuant to a state evidentiary rule that categorically and arbitrarily prohibits the defendant from offering otherwise relevant, reliable evidence that is vital to his defense." R.8029. Petitioner admitted that rules "ensuring that only reliable evidence is presented at trial," including relevance rules, "serve[] a legitimate interest and do[] not unconstitutionally abridge the right to present a defense." R.8032 (citing *United States v. Scheffer*, 523 U.S. 303, 309, 317 (1998)). She instead challenged the evidentiary ruling as *erroneous* because the evidence "was not irrelevant." R.8032, 8034.

To support ineffective-assistance claims not at issue here, petitioner submitted a post-trial affidavit from Pinkerman. R.8975. Allegedly, petitioner's "psychological characteristics increase the likelihood [that] she would acquiesce while providing her confession." R.8975. Petitioner's police statements "could have been accounted for by her dependent and acquiescent personality" and her history of "emotional[ly] and physically abusive relationships with males." R.8975-76. Pinkerman faulted trial counsel for failing to ask the court if he could opine on these matters. R.8975-76. Pinkerman did not explain why petitioner might accept blame when talking to her sister.

The state-habeas trial court recommended denying relief. Villanueva lacked "any sort of specialized experience, knowledge or training in the area of interpreting body language and patterns of behavior during police interviews," and Pinkerman's testimony on "psychological functioning, including how there was little support in the 'historical record' for the

idea that Applicant physically abused her children, that she suffered from battered woman syndrome, and the meaning of her demeanor after the incident and during questioning had no relevance to the question of Applicant's guilt or innocence." R.10091. There was no "abuse [of] discretion in excluding the testimony." R.10095-96.

Petitioner objected to the recommendations. R.5866-93. Petitioner reiterated that she was not challenging the circumstances of her interrogation or the experts' exclusion under *Crane*. R.5884. Petitioner did not contend that Pinkerman's post-trial affidavit supported her complete-defense claim. *See* R.5883-84.

The CCA denied relief based on the recommendations and independent review. R.5860.

6. In federal court, petitioner claimed that the "trial court deprived [her] of the constitutional right to present a complete defense when it excluded the testimony of defense experts during the guilt/innocence phase of trial." R.157. Petitioner cited cases that she did not rely on in state habeas. R.161 (citing *Holmes v. South Carolina*, 547 U.S. 319 (2006); *Rock*, 483 U.S. at 61; *Crane*, 476 U.S. at 690; *California v. Trombetta*, 467 U.S. 479, 485 (1984); *Chambers*, 410 U.S. at 298; *Washington v. Texas*, 388 U.S. 14, 19 (1967)). But her argument mirrored her state-habeas claim that the discretionary evidentiary ruling was erroneous. *Compare* R.163-64, *with* R.8032-34.

The Director responded that petitioner merely challenged the application of valid evidentiary rules. R.373. Complete-defense violations occurred "where an arbitrary *evidentiary rule* kept the evidence out." R.376. Petitioner, however, challenged "individual rulings—i.e. allegations of trial court error." R.376. That challenge was "barred under *Teague v. Lane*, 489 U.S. 288 (1989)." R.377.

The district court denied relief. R.577. Due process forbade "arbitrary or disproportionate" evidentiary rules. R.556. But petitioner's "real complaint" was "with the trial court's application" of valid rules "to her particular case." R.556. Federal courts could grant habeas based on evidentiary rulings "only when the trial judge's error is so extreme that it constitutes a denial of fundamental fairness under the Due Process clause." R.556-57. Excluding petitioner's experts "did not deny [petitioner] a fair trial." R.557.

A Fifth Circuit panel granted a COA on "whether the exclusion of [petitioner's] proffered experts on the credibility of her confession violated her constitutional right to present a complete defense." *Lucio v. Davis*, 751 F. App'x 484, 494 (5th Cir. 2018) (per curiam). Holding that the claim was never adjudicated, the panel granted de novo review, held that excluding Pinkerman prevented a complete defense, and granted relief. *Lucio v. Davis*, 783 F. App'x 313, 325 (5th Cir. 2019) (per curiam).

The Fifth Circuit granted the Director's petition for rehearing en banc. *Lucio v. Davis*, 947 F.3d 331 (5th Cir. 2020) (per curiam). A seven-judge plurality and three-judge concurrence affirmed the denial of relief. Pet. App. 6a-40a. These judges agreed that AEDPA foreclosed relief. *See* 28 U.S.C. § 2254(d)(1). Seven dissenting judges opined that the CCA unreasonably applied clearly established law. Pet. App. 65a.

REASONS FOR DENYING THE PETITION

I. No Circuit Split Warrants Review.

A. The split is illusory.

The alleged circuit split is illusory. *Contra* Pet. 23-30. Due process generally protects a "meaningful opportunity to present a complete defense." *Crane*, 476 U.S. at 690. This general principle is necessarily fact-specific. *See Montana v. Egelhoff*, 518 U.S. 37, 53 (1996) (plurality op.). Lower courts apply it accordingly.

Petitioner contends (at 22-23) that the Fifth and Ninth Circuits foreclose relief premised on applications of general evidentiary standards. Not so. In *Lunbery v. Hornbeak*, 605 F.3d 754 (9th Cir. 2010), the Ninth Circuit held that "California's *application* of its evidentiary rules denied [petitioner] her constitutional right to present a defense." *Id.* at 762 (emphasis added). Likewise, in *Rose v. Baker*, 789 F. App'x 5 (9th Cir. 2019), the court acknowledged that "[a]n evidentiary ruling abridges this right if it is 'arbitrary' or 'disproportionate to the purposes they are designed to serve'" and "it has infringed upon a weighty interest of the accused." *Id.* at 8 (quoting *Scheffer*, 523 U.S. at 308). Because the state supreme court's decision upholding a limitation of cross-examination violated clearly established law, the Ninth Circuit granted habeas relief. *Id.* The Fifth Circuit granted relief on similar grounds in *Kittelson v. Dretke*, 426 F.3d 306 (5th Cir. 2005) (per curiam). There, the court ruled that cabining lay-witness cross-examination unreasonably applied this Court's precedent. *Id.* at 310, 319-21. Petitioner, however, does not contend that anything barred her from cross-examining witnesses or presenting factual evidence.

Courts likewise agree that "a state law justification for exclusion will prevail unless it is 'arbitrary or disproportionate' and 'infringe[s] upon a weighty interest of the accused.'"

Pet. 24 (quoting *Fortini v. Murphy*, 257 F.3d 39, 46 (1st Cir. 2001)). But *Fortini* rejected attempts to constitutionalize state-law evidentiary rulings, noting that the case would have been even easier had AEDPA applied. 257 F.3d at 47-48. Petitioner cites other cases *upholding* applications of evidentiary rules, which present no conflict. *Contra* Pet. 24 nn.12 & 13, 26-27. Petitioner relies (at 27-28) on the Eight Circuit's decision in *Guinn v. Kemna*, 489 F.3d 351 (8th Cir. 2007), for the proposition that a complete-defense violation can be premised on an "erroneous evidentiary ruling." *Id.* at 354. But *Guinn* held no such thing, stating that clearly established law merely "prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote." *Id.*

Other cases agree that due process might require flexibility in overriding applications of certain evidentiary rules. *See* Pet. 26-27. But that was not petitioner's claim. Rather, as petitioner's authority explains, she challenged "the type of ordinary evidentiary ruling typically immune from constitutional error." *Savage v. Dist. Attorney*, 116 F. App'x 332, 339 (3d Cir. 2004). For instance, petitioner states that in *Scrimo v. Lee*, 935 F.3d 103, 112 (2d Cir. 2019), the Second Circuit "reason[ed] that the right to present evidence cannot be limited by arbitrary or disproportionate rules." Pet. 24 n.12. But *Scrimo* expressly rejected that reasoning for complaints of state-law evidentiary *errors* like the one petitioner alleges. 935 F.3d at 114-15. As *Lucio*'s plurality explained, "the Second Circuit produced a rule that looks nothing like the rules the dissenters (or we) set forth here." Pet. App. 37a.

Other cases involve evidentiary rules whose application this Court has specifically addressed. For instance, petitioner relies (at 25) on *Kubsch v. Neal*, 838 F.3d 845, 862 (7th Cir. 2016) (en banc) (hearsay rule), and *Fieldman v. Brannon*, 969 F.3d 792, 800-01 (7th Cir.

2020) (excluding defendant's own testimony). This Court's decision in *Chambers* squarely discussed the application of state hearsay rules. And, under *Rock*, 483 U.S. at 49, "[i]t's well-settled" that courts cannot limit "a defendant's own testimony." Pet. App. 37a. Such cases are "irrelevant to this case." Pet. App. 37a.

The supposed "minority approach," Pet. 28-30, concerns a different issue: the exercise of discretion to admit expert testimony. In *Moses v. Payne*, 555 F.3d 742 (9th Cir. 2009), the Ninth Circuit explained that no Supreme Court precedent "squarely address[es] whether a court's exercise of discretion to exclude expert testimony violates a criminal defendant's constitutional right to present relevant evidence." *Id.* at 758. This Court's cases did not "clearly establish 'a controlling legal standard' for evaluating discretionary decisions to exclude the kind of evidence at issue here." *Id.* at 758-59. Cases containing no comparable exclusion pose no "intra-circuit conflicts." Pet. 29 (citing *Chia v. Cambra*, 360 F.3d 997 (9th Cir. 2004); *Perry v. Rushen*, 713 F.2d 1447 (9th Cir. 1983)). For instance, the evidence in *Chia* involved exculpatory co-conspirator statements, not expert opinions. 360 F.3d at 1004-06. Likewise, the expert witness in *Ferensic v. Birkett*, 501 F.3d 469 (6th Cir. 2007), was excluded as a discovery sanction, not for inadmissibility. *Id.* at 473, 476. *Ferensic* poses no conflict regarding threshold *admissibility* determinations. *Contra* Pet. 25.

Any perceived conflict flows from misframing precedent. In *Nevada v. Jackson*, 569 U.S. 505 (2013) (per curiam), this Court rejected the Ninth Circuit's reliance on caselaw about a defendant's ability to cross-examine a witness. *Id.* at 511. Cases dealing with "restrictions on a defendant's ability to *cross-examine* witnesses" dictated no rule about an alleged right "to introduce *extrinsic evidence* for impeachment purposes." *Id.* at 511-12.

Spinning this Court's caselaw into a right "to present evidence bearing on [a witness's] credibility" stated this Court's precedent at too "high [a] level of generality." *Id.* at 512.

Even if petitioner correctly described a split, her preferred view is wrong. This Court's holdings discuss "the *blanket* exclusion of the proffered testimony about the circumstances of petitioner's confession." Pet. App. 35a. As the plurality explained, such "holding[s] remain[] binding" and precluded "extending *Crane* from blanket exclusions to discretionary ones." Pet. App. 35a. Under AEDPA, that was all that mattered. If, as petitioner concedes (at 34), this Court has "narrowly tailored" complete-defense holdings, that confirms that petitioner's rule is not clearly established.

B. The alleged split cannot help petitioner.

1. The Fifth Circuit created no conflict over whether "this Court's cases only clearly apply when the validity of a state evidentiary rule excluding an entire category of defense evidence is at issue." Pet. 28. Under Fifth Circuit rules, "[w]ithout a majority, no controlling precedent was made." *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 179 (5th Cir. 2020). Moreover, petitioner disclaimed her theory in state court, where she did not challenge the mere *application* of a valid state evidentiary rule. Petitioner complained about an *erroneous* ruling. *See* R.8032-34.

On that issue, petitioner identifies no circuit split, and the plurality correctly declined to create one. Pet. App. 21a. And even if other *circuits* might understand clearly established law differently, the CCA was not required to agree. "[C]ircuit precedent does not constitute 'clearly established Federal law.'" *Parker v. Matthews*, 567 U.S. 37, 48 (2012) (per curiam).

Courts also agree that a "habeas petitioner's challenge to an 'evidentiary ruling' cannot satisfy § 2254(d)(1) unless the petitioner identifies 'a Supreme Court case establishing a due

process right with regard to [the] *specific kind of evidence*' at issue." *Stewart v. Winn*, 967 F.3d 534, 538 (6th Cir. 2020). In *Loza v. Mitchell*, 766 F.3d 466 (6th Cir. 2014), the Sixth Circuit likewise denied relief because the trial court "did not exclude [expert] testimony arbitrarily" and the state supreme court's decision "was not contrary to or an unreasonable application of *Crane*." *Id.* at 486. In *Richardson v. Kornegay*, 3 F.4th 687 (4th Cir. 2021), the court similarly denied relief because upholding the discretionary exclusion of expert testimony "was not an unreasonable application of clearly established federal law." *Id.* at 698-99. "Far from being so unreasonable as to violate clearly established due process rights," the ruling was "well within the range of what reasonable jurists do." *Id.*

To prevail, petitioner needed precedent to "do more" than apply to discretionary rulings. Pet. App. 39a. "[N]o Supreme Court opinion hold[s] that an error in the discretionary application of a general evidentiary standard is a constitutional violation." Pet. App. 39a-40a. Petitioner "must do much more than establish that the state court erred" regarding the admissibility of expert testimony. Pet. App. 19a (citing *Renico v. Lett*, 559 U.S. 766, 773 (2010)). This Court regularly reverses courts for granting habeas "despite ample room for reasonable disagreement." *Shinn v. Kayer*, 141 S. Ct. 517, 520 (2020) (per curiam).

2. The circuit split does not speak to any "misreading of this Court's precedent" below. Pet. 30. The issue was not whether "precedent positively precludes the state court from holding what it held." Pet. App. 34a (citing *Woods v. Etherton*, 136 S. Ct. 1149, 1152 (2016) (per curiam)). Petitioner identifies no split on AEDPA's leeway for state courts addressing disparate evidentiary rulings. Unlike *Crane*, petitioner did not challenge a "blanket exclusion" of evidence regarding the circumstances of her confession. *See* 476 U.S. at 690. And unlike *Chambers* and *Green v. Georgia*, 442 U.S. 95 (1979) (per curiam), petitioner did not

claim that the trial court "mechanistically" applied rules categorically excluding types of evidence regardless of relevance or reliability. *See Green*, 442 U.S. at 97; *Chambers*, 410 U.S. at 302. She argued that rules against unreliable and irrelevant evidence "serve[] a legitimate interest and do[] not unconstitutionally abridge the right to present a defense," R.8032, but the application of those rules was erroneous, and therefore precluded a complete defense. *See* R.8032; *see also* R.8033-34. No precedent compelled the conclusion that petitioner was denied a complete defense. *See Goeke v. Branch*, 514 U.S. 115, 118 (1995) (per curiam).

There is nothing "absurd" about declining to constitutionalize discretionary evidentiary rulings. Pet. 33. At petitioner's level of generality, "*every* state-law evidentiary ruling in a criminal case implicates" due process. Pet. App. 33a-34a. The Constitution forbids this. *See Estelle v. McGuire*, 502 U.S. 62, 67 (1991). Due process does "not set[ ] forth an absolute entitlement to introduce crucial, relevant evidence" at a criminal trial. *Egelhoff*, 518 U.S. at 53 (plurality op.). "*Crane* does not establish—much less clearly establish—a universal, free-standing right to introduce competent and reliable evidence challenging a confession's credibility." Pet. App. 33a. Even if petitioner were right about categorical exclusions, she still cannot overcome *Crane*'s limitation to *factual* evidence. *Contra* Pet. 31-33. Indeed, the trial court admitted evidence that would have been excluded in *Crane*. Pet. App. 34a. Any error in excluding petitioner's experts did not deprive her of a fair trial. R.557.

Petitioner also misunderstands *Chambers*. *Contra* Pet. 30-31. In petitioner's telling, evidentiary rules must yield whenever evidence has "persuasive assurances of trustworthiness." Pet. 30-31. Rather, *Chambers* illustrates that "erroneous evidentiary rulings can, *in combination*, rise to the level of a due process violation." *Egelhoff*, 518 U.S. at 53 (plurality

op.) (emphasis added). That is why, as this Court recognized in *Chambers* and *Green* that "the hearsay rule may not be applied *mechanistically*" to draconian ends. *Green*, 442 U.S. at 97 (emphasis added). Those cases indicate that due process occasionally requires *exceptions* to evidentiary rules, not that *Chambers* clearly establishes a constitutional standard for state-law error correction.

Moreover, petitioner misunderstands *Holmes*. Pet. 32. *Holmes* did not "involve[] the type of 'discretionary application of a general evidentiary standard' that the *Lucio* court believed was excluded from this Court's case law." Pet. 33 (quoting Pet. App. 39a-40a). *Holmes* addressed "whether a criminal defendant's federal constitutional rights are violated by an evidence rule under which the defendant may not introduce proof of third-party guilt if the prosecution has introduced forensic evidence that, if believed, strongly supports a guilty verdict." 547 U.S. at 321. *Holmes* established nothing about "discretion to admit or exclude irrelevant evidence." Pet. 33. Rather, "no logical conclusion [could] be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." *Holmes*, 547 U.S. at 331. In any case, petitioner's expert opinions are not evidence of third-party guilt. Petitioner's argument (at 33) that the rules here "do not fit neatly into the categorical/discretionary dichotomy" likewise overlooks the "judgment and choice" inherent in the rulings she attacks, which distinguishes them from other cases. Pet. App. 35a.

II. The En Banc Fifth Circuit Correctly Affirmed the Denial of Habeas Relief.

Absent a split, all that remains is a request for error correction. *Contra* Sup. Ct. R. 10. But the Fifth Circuit properly applied AEDPA to a state-court adjudication that is well within the bounds of reasonableness.

A. The judgment correctly follows AEDPA.

The judgment affirming the district court properly followed AEDPA's requirements, which are "difficult to meet." *White v. Woodall*, 572 U.S. 415, 419 (2014).[4]

1. AEDPA precluded relief unless the state 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." *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. *Lett*, 559 U.S. at 776.

2. The Fifth Circuit faithfully applied these principles.

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[4] Petitioner does not argue factual unreasonableness under 28 U.S.C. § 2254(d)(2), which the plurality correctly rejected. Pet. App. 26a-28a.

a. Federal law clearly establishes that defendants are guaranteed a meaningful opportunity to present a complete defense. *See Crane*, 476 U.S. at 690. The plurality and concurrence followed that principle. Pet. App. 17a; Pet. App. 39a. Petitioner divines a contrary position from assorted cases addressing a variety of state evidentiary rules. *See* Pet. 23-28. But because no Supreme Court holding required admitting expert testimony about the credibility of petitioner's statements, the state-court decision cannot have been "contrary to or an unreasonable application of clearly established federal law." *Musladin*, 549 U.S. at 77.

Scheffer expressly rejected that a complete defense requires expert testimony on credibility. 523 U.S. at 316-17. The underlying prohibition was "neither arbitrary nor disproportionate in promoting" the ends of "ensuring that only reliable evidence is introduced at trial[and] preserving the court members' role in determining credibility." *Id.* at 309 (recognizing Federal Rule of Evidence 702's similar legitimate interests). The Court distinguished the rule against expert testimony from *Chambers* "because, unlike the evidentiary rules at issue" elsewhere, the expert rule "does not implicate any significant interest of the accused" and "did not preclude him from introducing any factual evidence." *Id.* at 316-17.

Chambers, *Green*, and *Crane* apply similarly. *Chambers* found a due process violation from Mississippi's voucher rule, which prevented parties from impeaching their witnesses, and Mississippi's hearsay rule, which did not recognize an exception for statements against penal interest. 410 U.S. at 302. Chambers was "unable either to cross-examine [his witness] or to present witnesses in his own behalf who would have discredited [the witness]'s repudiation [of his confession] and demonstrated his complicity" in the crime. *Id.* at 294. Missis-

sippi did not defend its rule, and the excluded hearsay "bore persuasive assurances of trustworthiness." *Id.* at 297, 302. In *those* circumstances, "the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Id.*

In *Green*, Georgia's hearsay rule violated due process by categorically excluding exculpatory factual testimony regardless of reliability. Georgia had no hearsay exception for declarations against penal interest. 442 U.S. at 96 & n.1. But "substantial reasons existed to assume [the testimony's] reliability," and "the State considered the testimony sufficiently reliable to use it" in another capital case. *Id.* at 97. In such "unique circumstances," the "hearsay rule" cannot be applied "mechanistically." *Id.*

In *Crane*, "blanket exclusion of the proffered testimony about the circumstances of petitioner's confession deprived him of a fair trial." 476 U.S. at 690. The trial court excluded evidence under Kentucky's rule categorically barring the circumstances of a confession that had been deemed voluntary. *Id.* at 686-87. The excluded evidence was "competent, reliable evidence bearing on the credibility of a confession" and the State offered no "rational justification" for its rule. *Id.* at 690-91. Thus, "wholesale exclusion" of this evidence was improper. *Id.* at 691.

Petitioner suggests that even if none of this Court's cases clearly establish the rule she seeks, she can cobble it together from other cases. *See* Pet. 34-36. Petitioner misunderstands what it means to clearly establish federal law under AEDPA. The most petitioner could say is that her position derives from cases *rejecting* arguments like petitioner's. Pet. App. 33a-35a. That hardly reflects a "set of principles that 'are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt.'" Pet. 35-36 (quoting *Yarborough*, 541 U.S. at 666). Nor can petitioner attack the

concurrence (Pet. App. 39a-40a) for distinguishing petitioner's case from existing precedent. *Contra* Pet. 35. Petitioner's own authority recognizes that AEDPA bars relief when a petitioner's case is "distinguishable" from existing complete-defense cases. *Pittman v. Sec'y, Florida Dep't of Corr.*, 871 F.3d 1231, 1247 (11th Cir. 2017).

b. Neither the plurality nor the concurrence concluded that the CCA applied a rule that is contrary to the governing law. *See* 28 U.S.C. § 2254(d)(1). Indeed, the state court could not have diverged from this Court's precedent. *See Williams*, 529 U.S. at 406. *Crane*, *Chambers*, and their progeny do not involve "facts that are materially indistinguishable" from petitioner's case. *Id.* Petitioner conceded no case was on "all fours" with hers. Pet. App. 19a.

c. The Fifth Circuit also correctly applied AEDPA's unreasonable-application prong. *Crane* and *Chambers* lack "specificity" for outcomes of state evidentiary rulings. *Richter*, 562 U.S. at 101. The "possibility for fairminded disagreement" is at its apex. *Id.* at 101-03. It is not unreasonable "to decline to apply a specific legal rule that has not been squarely established by this Court." *Id.* at 101.

No precedent required admitting petitioner's experts. Pet. App. 34a. "[F]airminded jurists" can "disagree" about petitioner's evidence. *Richter*, 562 U.S. at 101. A decision is unreasonable 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." *Woodall*, 572 U.S. at 427 (quoting *Richter*, 562 U.S. at 103). Here, fairminded jurists could conclude that no Supreme Court case applies to the "set of facts" at issue. *Id.*

Petitioner cannot fault the CCA for "unreasonably appl[ying] *Crane* by failing to extend it to *discretionary* evidentiary decisions." Pet. App. 20a (citing *White*, 572 U.S. at 426). Unlike *Crane*, the trial court did not bar "testimony about the environment in which the

police secured [her statement]," or demand the "wholesale exclusion of this body of potentially exculpatory evidence." 476 U.S. at 691. Far from upholding any *per se* ban, the CCA upheld fact-specific exclusions of petitioner's experts on the record made by trial counsel. That forecloses any argument "that Texas courts *categorically* prohibited evidence undermining her inculpatory statements." Pet. App. 20a.

Nor was *Chambers* unreasonably applied. Petitioner argued "that the exclusion of the experts' opinions made her trial unfair because it precluded her from proving that she did not beat her child to death or commit ongoing abuse of Mariah, even though she admitted to committing abuse." Pet. App. 23a. But *Chambers* "involved an idiosyncratic state . . . evidentiary [rule] that was 'arbitrary,' 'did not rationally serve any discernible purpose,' and 'could not be rationally defended.'" Pet. App. 23a-24a (quoting *Jackson*, 569 U.S. at 509). To hold that the CCA unreasonably applied these cases, the Court would "have to (1) extend them or (2) frame them 'at such a high level of generality' that we'd 'transform even the most imaginative extension of existing case law into clearly established Federal law, as determined by the Supreme Court.'" Pet. App. 24a (quoting *Jackson*, 569 U.S. at 512).

AEDPA "precludes that." Pet. App. 24a. If *Jackson* prohibited extending cross-examination rules to cover extrinsic evidence, *see* 569 U.S. at 511-12, then petitioner cannot fault the Fifth Circuit for declining to extend general rules from *Crane* and *Chambers* to mandate expert admissibility. Nor can she fault the CCA for leaving precedent unextended. *White*, 572 U.S. at 426.

Refusing to expand precedent is hardly "inconsistent with" *Jackson*. Pet. 29 n.16. *Jackson* noted that Nevada's extrinsic evidence rule—on its face—serves legitimate aims and is

a "widely accepted rule of evidence law." 569 U.S. at 510. That is why the Court could distinguish cases dealing with facially illegitimate rules. *Id.* at 510-11. Because petitioner claimed only that the state court *incorrectly applied* a "widely accepted rule of evidence," *id.* at 510, that ends AEDPA's inquiry.

B. The CCA acted well within the bounds of reasonableness.

AEDPA requires this Court to ask whether the CCA's adjudication was unreasonable, not whether the trial court's application of state evidentiary rules was correct. *See, e.g.*, *Woodall*, 572 U.S. at 419, 425. State courts need not even be aware of applicable precedent. *See Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam). AEDPA forecloses relief if "fair-minded jurists could disagree" about the "correctness" of decisions. *Davis v. Ayala*, 576 U.S. 257, 269 (2015).

The CCA "considered [the] two proffered experts on an individualized basis and found their opinions to be inadmissible as a matter of state law." Pet. App. 21a. This is precisely the inquiry that cases like *Holmes* would have trial courts make. *See* 547 U.S. at 326-27. "*Crane* itself recognizes that trial judges are 'called upon to make dozens, sometimes hundreds, of decisions concerning the [relevance] of evidence' in a given case" with "wide latitude" to do so. Pet. App. 35a (quoting *Crane*, 476 U.S. at 689). A state-law evidentiary error alone is not cognizable in federal-habeas review. *See McGuire*, 502 U.S. at 67-68. And under AEDPA, "an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Richter*, 562 U.S. at 101 (quoting *Williams*, 529 U.S. at 410).

Nothing *required* admitting expert testimony to explain the defendant's own statements. *See* Pet. App. 21a (citing *Loza*, 766 F.3d at 486). There is "no clearly established law regarding 'a court's exercise of discretion to exclude expert testimony' as it relates to a

'criminal defendant's constitutional right to present relevant evidence.'" Pet. App. 20a (quoting *Moses*, 555 F.3d at 758-59). Other cases have "upheld state courts' wide latitude to make discretionary evidentiary decisions." Pet. App. 20a-21a (citing *Grant v. Royal*, 886 F.3d 874, 959-60 (10th Cir. 2018); *Troy v. Sec'y, Fla. Dep't of Corr.*, 763 F.3d 1305, 1307, 1315 (11th Cir. 2014); *Gagne v. Booker*, 680 F.3d 493, 516 (6th Cir. 2012) (en banc); *Rucker v. Norris*, 563 F.3d 766, 770 (8th Cir. 2009)). Like in *Scheffer*, petitioner's experts' exclusion "did not preclude [her] from introducing any factual evidence [about her interrogation]. Rather, [petitioner] was barred merely from introducing expert opinion testimony to bolster h[er] own credibility." 523 U.S. at 317. "State and Federal Governments unquestionably have a legitimate interest in ensuring that reliable evidence is presented to the trier of fact in a criminal trial." *Id.* at 309.

There was also ample room for disagreement that petitioners' experts offered *competent, reliable* evidence bearing on the credibility of her own statements. Although petitioner bore the burden on that issue, petitioner secured no such findings. On direct review, federal courts assess decisions to exclude expert testimony for abuse of discretion. *See, e.g.*, *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 153 (1999). Adopting petitioner's rule would give state prisoners on collateral review a more favorable standard of review (de novo) than the standard applicable to federal direct appeals (abuse of discretion). Habeas review runs the other way. *See, e.g.*, *Brecht v. Abrahamson*, 507 U.S. 619, 633-38 (1993).

III. Multiple Vehicle Problems Complicate Review.

This case presents several vehicle problems. Relief is independently barred by *Teague* and fails even without AEDPA deference. Nor did petitioner fairly present the current version of her claim in state court. *Contra* 28 U.S.C. § 2254(b)(2); *Picard v. Connor*, 404 U.S. 270, 278 (1971). Petitioner's efforts to cast this case as a good vehicle fall short.

A. Independent grounds preclude relief.

1. Petitioner's claim is *Teague*-barred.

AEDPA aside, *Teague* holds that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." 489 U.S. at 310 (plurality op.). Petitioner requires this Court to hold, for the first time, that state courts must admit expert testimony to undermine a defendant's own statements. This independently bars relief, *see Horn v. Banks*, 536 U.S. 266, 272 (2002) (per curiam), because it was not "compelled by existing precedent" when petitioner's conviction became final, *O'Dell v. Netherland*, 521 U.S. 151, 156 (1997). Such new rules cannot apply retroactively. *Edwards v. Vannoy*, 141 S. Ct. 1547, 1560 (2021).

Here, relief requires at least two new rules: a trial court's exercise of *Daubert*'s gatekeeping function can violate the complete-defense right, and defendants are entitled to expert testimony interpreting their own statements. But this Court has never interpreted the complete-defense right to mandate exercising discretion in a particular way, and this Court has rejected extending the right to expert testimony. *Cf. Scheffer*, 523 U.S. at 309, 313-14.

2. Petitioner fails de novo review.

Even if petitioner could overcome *Teague*, her claim fails de novo review. Petitioner alleges that her experts' testimony was (1) critical to her defense of innocence; (2) excluded

for reasons that were arbitrary and disproportionate to the purposes of the evidence rules applied; (3) reliable. Pet. 39-40. Assuming that these elements comprise a complete-defense claim, petitioner cannot prove them. Moreover, any error was harmless.

a. The expert testimony petitioner proffered at trial was not critical to her strategy of "casting doubt on the supposed confession." Pet. 39. Unlike in *Crane* and *Chambers*, the trial court did not bar petitioner from doing so. Her interrogation was visible on tape. Nothing prevented petitioner from presenting fact witnesses to testify about her body language or propensity to take blame. Nor was petitioner barred from explaining herself. *Cf. Rock*, 483 U.S. at 62 (Arkansas' *per se* rule violated the defendant's right "to testify on h[er] own behalf"). Invoking battered woman syndrome was especially dubious given that petitioner did not claim self-defense from domestic abuse.

b. The application of evidentiary rules was neither arbitrary nor disproportionate. States have "broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *Scheffer*, 523 U.S. at 308. States "unquestionably have a legitimate interest in ensuring that reliable evidence is presented to the trier of fact in a criminal trial. Indeed, the exclusion of unreliable evidence is a principal objective of many evidentiary rules." *Id.* at 309. On the record actually before the trial court, excluding petitioners' experts properly tracked relevancy and reliability concerns. *See* Pet. App. 24a-26a.

Nor did the expert testimony "help the trier of fact to understand the evidence or to determine a fact in issue." Tex. R. Evid. 702. To be relevant, proposed expert testimony must be "sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute." *E.I. du Pont de Nemours Co. v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995). In *United States v. Hall*, 93 F.3d 1337 (7th Cir. 1996), which petitioner cited in her state and

federal habeas applications, the court explained that the second part of the *Daubert* inquiry—whether the expert's scientific knowledge "will assist the trier of fact to understand or determine a fact in issue"—"is essentially a relevance inquiry." *Id.* at 1341-42.

A fact-specific, discretionary decision excluding experts fit such objectives. That is why parallel federal evidentiary rules comport with the "legitimate interest in ensuring that reliable evidence is presented to the trier of fact in a criminal trial." *Scheffer*, 523 U.S. at 309 (citing Fed. R. Evid. 702). Barring petitioner's experts was "neither arbitrary nor disproportionate" and does not "implicate a sufficiently weighty interest of the defendant." *Id.* at 309.

Nor was there disparity in any rule's application. In *Washington*, the Court found disparity in an evidentiary rule "disqualifying an alleged accomplice from testifying on behalf of the defendant" because the rule allowed testimony for the State. 388 U.S. at 22. Ranger Escalon's testimony about petitioner's demeanor presented no disparity because he was not offered as an expert and merely recounted his personal observations explaining how he approached taking petitioner's statement. In any case, petitioner could have objected to Escalon but did not. R.14951-53.

c. Petitioner's experts were unreliable, lacking "probative value." Pet. 39. Courts accept that *jurors* are best qualified to determine the truth of a defendant's statements. The Fifth Circuit has held that an order preventing a defendant "from introducing expert opinion testimony to bolster his own credibility" is not arbitrary or disproportionate to the purpose of "protecting the province of the jury on the question of credibility of a confession." *Boyer v. Vannoy*, 863 F.3d 428, 454-55 (5th Cir. 2017). Rendering such opinions from *body language* is even farther afield. Villanueva and Pinkerman were properly qualified to testify

on mitigation. But it does not follow that they were qualified to render an opinion on the defendant's credibility in the guilt phase, particularly when that opinion suggests that jurors should not believe the defendant.

Petitioner's experts lacked other indicia of reliability. For instance, Villanueva identified no specialized training to interpret body language. R.15236-41. As the trial court said, "an expert that is a psychologist . . . that has done studies on that and has done academic background on that, that may or may not be appropriate." R.15233. Petitioner does not contend that her experts had such background. *Contra* Pet. 40. Any suggestion that Pinkerman's reliability went unquestioned is baseless, given that concerns about Pinkerman's "generalized proffer" precipitated his exclusion at the guilt phase. Pet. App. 16a.

d. Any error was harmless. Petitioner identifies no "substantial and injurious effect or influence [on] the jury's verdict." *Brecht*, 507 U.S. at 631. Medical testimony revealed Mariah's head trauma as inconsistent with an accidental fall. R.15095. Evidence that anyone but petitioner killed Mariah was "tenuous at best." R.557.

When Pinkerman and Villanueva testified during the punishment phase, jurors were unpersuaded. R.15529-652; R.15654-731. The jury likely would have dismissed the theory that petitioner would admit to anything based on the interview video, which did not show a woman taking blame for everything. Even if jurors discredited petitioner's recorded statement, that would have left jurors with petitioner's statement to her sister—"I did it," R.14991; petitioner's demonstration of abuse, R.8220-31; R.14958; and medical testimony strongly suggesting that petitioner's story blaming Mariah's head injury on an accidental fall was untruthful, R.15095. It would have also opened the door to statements from peti-

tioner's children "that [petitioner] was an aggressor." R.10089. And Pinkerman's equivocation on the question of battered woman syndrome, R.15710-12, likely would have led the jury to discount the topic.

Moreover, petitioner urged jurors to credit her denial of killing Mariah because she admitted abuse. R.15340-43. The experts would have invited jurors to discredit parts of petitioner's statement (admitting abuse) while crediting others (denying responsibility for the head injury). A mere "possibility" that jurors might have reasoned past conflicting inferences cannot satisfy *Brecht*. 507 U.S. at 637.

B. Petitioner's shifting claim presents significant vehicle problems.

As the plurality explained (Pet. App. 17a), AEDPA required the court to identify the "last state-court decision to adjudicate [her] claim" and "evaluate that decision under the relitigation bar." *See Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). For reasons explained by *Lucio*'s plurality, these questions pose significant barriers to review.

1. As currently framed, petitioner did not fairly present a cognizable federal claim in state court. Petitioner expressly premised her state-habeas claim on the trial court's alleged erroneous application of evidentiary rules governing admissibility of expert testimony. R.8032-34. The state-habeas conclusion that the trial court "did not abuse its discretion in excluding the testimony of Norma Villanueva and Dr. John Pinkerman" responded directly to petitioner's claim. R.10095. There is no doubt that the claim petitioner presented in state court was adjudicated on the merits. *See Johnson v. Williams*, 568 U.S. 289, 292 (2013).

Any argument that excluding petitioner's experts was arbitrary and disproportionate to the purposes of evidentiary rules cannot form the basis of federal habeas relief because petitioner did not fairly present that issue in state court. Petitioner did not claim that the

rules in question are "arbitrary" or "disproportionate to the purposes they are designed to serve." *See Scheffer*, 523 U.S. at 308. To the contrary, she conceded that they are legitimate and do not "unconstitutionally abridge the right to present a defense." R.8032. Petitioner did not discuss *Green* or *Chambers*, and cited *Crane* only to disclaim reliance on it. *See* R.8029 n.36. The state court's conclusion that excluding petitioner's experts was not an abuse of discretion responded directly to arguments petitioner made in state court. Petitioner forfeited—and failed to exhaust—any alternative formulation of that claim. *See, e.g.*, *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2560 (2018) (per curiam).

Insofar as petitioner's claim turns on alleged errors of state law, she does not present a cognizable federal claim. Such a claim is not cognizable because it concerns "state-court determinations on state-law questions." *McGuire*, 502 U.S. at 68. "[F]ederal habeas corpus relief does not lie for errors of state law." *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990).

The notion that petitioner can now reframe her claim "has no basis in law." Pet. App. 30a. "[S]tate prisoner[s] can raise different claims at different times with different facts in the state court," but they cannot "then smush them all together into a single claim in federal court." Pet. App. 30a. AEDPA demands "tak[ing] [petitioner] at her word" that "she was *not* trying to introduce expert testimony to 'answer the one question every rational juror needs answered: If [petitioner] is innocent, why did [s]he previously admit h[er] guilt?" Pet. App. 36a. "At no point did trial counsel suggest that the exclusion of either witness would violate" due process. Pet. App. 15a. "And at no point did either expert offer to testify about the circumstances of [petitioner]'s custodial interrogation and whether she felt psychological pressure to admit to abusing Mariah. As Pinkerman himself later said, 'To my knowledge these issues were never raised.'" Pet. App. 16a (citing R.8975).

The proper analysis is not "idiosyncratic." *Contra* Pet. 35 n.18. Petitioner effectively admits "fundamentally alter[ing]" the claim she presented in state court. *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986). Any new formulation (*e.g.*, Pet. 39-40) would be unexhausted and ineligible for relief. *See id.*; 28 U.S.C. § 2254(b)(1)(A). Nor would AEDPA's relitigation bar permit such altered arguments. *Cf. Beaudreaux*, 138 S. Ct. at 2560.

2. Nor can petitioner contend that "the state trial court's decision to exclude the proffered testimony was 'complete[ly] irrational[]." Pet. App. 25a-26a. The argument poses significant vehicle problems. Per the plurality (Pet. App. 26a-27a), Villanueva's inadmissibility is unassailable, and petitioner depends "on an affidavit" from Pinkerman "that wasn't even written until many years after the trial and was first presented in a state habeas application that disclaimed" the theory that she had falsely taken blame. Pet. App. 26a. AEDPA forbids finding a state-court adjudication *unreasonable* from such evidence. Pet. App. 26a.

On direct appeal, the CCA found that Pinkerman was not "offering any guilt-phase testimony that, 'since she was an abused woman [petitioner] would agree with anything a policeman would say.'" *Lucio*, 351 S.W.3d at 901. Petitioner's framing of Pinkerman's testimony did not "comport with Pinkerman's proffered testimony at trial" or "with what the trial attorney claimed that he was offering it for." *Id.* at 902. Under AEDPA, these findings are presumed correct, and petitioner lacks "clear and convincing evidence" overcoming them. 28 U.S.C. § 2254(e)(1). So, too, for findings about Villanueva. *See* Pet. App. 26a-27a.

Petitioner's position on Pinkerman also violates *Cullen v. Pinholster*, 563 U.S. 170 (2011), which "preclude[s] Lucio from smushing together separate complete-defense claims to create a new one that amalgamates her factual and legal contentions at trial, on direct appeal, and in state habeas." Pet. App. 31a. Pinkerman's trial proffer "provided no basis

upon which the state courts could have concluded that his testimony would have assisted the jury in understanding why Lucio made the statements that she did, why her demeanor was what it was, or whether she murdered her child." Pet. App. 24a. His report never "hint[ed] that any of [petitioner's] statements were false." Pet. App. 25a. Pinkerman's punishment-phase testimony never suggested that petitioner "was susceptible to taking blame for something that was not her fault." Pet. App. 25a. Petitioner cannot "combine[] the facts in the Pinkerman affidavit (from state habeas) with the *Crane* claim (from direct appeal) to hold the exclusion of Pinkerman's proffer (at trial) was arbitrary and 'complete[ly] irrational[ ].'" Pet. App. 24a.

This also refutes petitioner's suggestion (at 40) that her experts went unquestioned. Petitioner made no record of what specific evidentiary rules justified Pinkerman's testimony. The court excluded Pinkerman without hearing from the State, which presumably could have thoroughly explained why Pinkerman's testimony was inadmissible. Villanueva's inadmissibility was unassailable. *See* Pet. App. 26a-27a.

C. Petitioner cannot overcome these vehicle problems.

1. Petitioner's position has not "been consistently aired at all stages of this case." Pet. 38-40. Any argument that due process required admitting her experts *notwithstanding their discretionary exclusion* was absent at trial, direct appeal, and state-habeas. The State did not "concede[that] *this* claim was fairly presented to the state court." Pet. 38 (citing R.374) (emphasis added). Petitioner presented *some* complete-defense claim, but not her current version (Pet. App. 14a) or ones hypothesized by former-prosecutor amici (at 16-22).

Moreover, any answer to the "purely legal question about clearly established law" would be advisory because petitioner cannot show "the state court unreasonably applied

the clearly established law." Pet. 38. No majority combination of judges below found that Pinkerman's exclusion "was arbitrary and disproportionate to the purposes of the relevancy rule" or found "a lack of parity between the prosecution and defense." Pet. 39. And the Fifth Circuit has held elsewhere that state courts may exclude expert testimony about properly interpreting confessions. *See Boyer*, 863 F.3d at 452-54.

A federal court violates AEDPA by "substitut[ing] its own judgment for that of the state court instead of applying deferential review." *Kayer*, 141 S. Ct. at 524. Yet that is what the dissenters propose to do. *See* Pet. App. 58a n.11. AEDPA bars using complete-defense cases to blend complaints about *expert* opinion on a confession with the *factual* circumstances in which a confession was taken, Pet. App. 36a-37a, let alone "the stark differences between what Pinkerman says today and what he proffered at trial," Pet. App. 28a.

2. Petitioner urges new scrutiny for interrogations implicating "gender roles and physical contact." Pet. 37. Under AEDPA, however, the only question is whether state courts unreasonably applied *clearly established* law. *See Woodall*, 572 U.S. at 426. Petitioner's interrogation was within the bounds of clearly established law and petitioner does not contend otherwise. Nor did petitioner "give the trial court the slightest hint that admission of the Pinkerman-Villanueva testimony was compelled" by "anything in federal law" or a "complete defense." Pet. App. 31a. Counsel "never explained why the testimony mattered" or "said anything about the jury's role in evaluating the credibility of Lucio's custodial statements." Pet. App. 31a. Texas law already requires a "contemporaneous electronic recording" ensuring the integrity of custodial interrogations like petitioner's. Tex. Code Crim. Proc. art. 2.32(b). There is no occasion to take up petitioner's recent exploration of "false

confessions and child victims," Pet. 36, let alone examples that are materially different than petitioner's custodial interrogation, Pet. 37-38.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2021