No. 11-1215

In the Supreme Court of the United States

ABU-ALI ABDUR'RAHMAN,
Petitioner,

v.

ROLAND COLSON, WARDEN,
Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED BY THE PETITION

1. When is "cumulative error" a legally permitted basis for relief on federal habeas corpus?

2. Is a prosecutor's suppression of material exculpatory evidence excused whenever the defendant was aware of the facts contained therein, notwithstanding that the suppression prevented the defense from presenting the evidence of those facts to the jury?

3. Is defense counsel's failure to investigate evidence that has some negative characteristics categorically immune from a claim of ineffective assistance of counsel?

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STATEMENT OF THE CASE

On the night of February 17, 1986, petitioner, then known as James Jones, brutally murdered Patrick Daniels and attempted to murder Norma Norman in their own home.

> On February 16, 1986, Petitioner purchased a small amount of marijuana from Patrick Daniels at the duplex in which Daniels lived in Nashville, Tennessee. Petitioner and Harold Devalle Miller later agreed to rob Daniels. . . .
>
> On February 17, 1986, Petitioner, armed with a shotgun, and Miller, armed with an unloaded pistol, entered the [victims'] duplex under the pretext of making a drug purchase. Petitioner and Miller displayed their firearms and forced Daniels and his girlfriend, Norma Norman, to the floor. Petitioner then bound Daniels and Norman with duct tape about their hands, feet, eyes, and mouth. After stealing Daniels's bank card, Petitioner forced Daniels to reveal his PIN number. Petitioner also searched the house and found some marijuana in some sofa cushions.
>
> Petitioner then told Daniels that he had been sent from Chicago to "clean up everything" and that he was there to teach Daniels a lesson. Petitioner obtained a butcher knife from the kitchen and stabbed Daniels six times in the chest, penetrating his heart four times. Prior to and during the stabbing, Daniels was crying and begging Petitioner not to hurt anyone. After Daniels became motionless, Petitioner stabbed

> Norman in the back several times, but Miller pulled Petitioner away and the two men fled, leaving the knife in Norman's back. Daniels died as the result of his wounds, but Norman survived. Petitioner and Miller also took $300 from a box in Norman's bedroom.

(Pet. App. 92a-93a) Petitioner was convicted of first-degree murder, assault with intent to commit first-degree murder, and armed robbery. After a sentencing hearing, the jury found three aggravating circumstances: (1) the defendant was previously convicted of one or more felonies involving violence to the person;[1] (2) the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind; and (3) the murder was committed while the defendant was committing or attempting to commit any first degree murder or robbery. Petitioner was sentenced to death for the murder and to consecutive life sentences for each of his other convictions; his convictions and sentences were affirmed on direct appeal. *State v. Jones*, 789 S.W.2d 545, 546-47, 550 (Tenn. 1990). On state post-conviction review, the trial court denied relief after an evidentiary hearing, and the Tennessee Court of Criminal Appeals affirmed. *Jones v. State*, No. 01C01-9402-CR-00079, 1995 WL 75427 (Tenn. Crim. App. Feb. 23, 1995). The Tennessee Supreme Court denied petitioner's application for discretionary review. *Id.* at *1.

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[1] Evidence of petitioner's 1972 conviction for second-degree murder and 1970 conviction for assault with a dangerous weapon (a knife) was presented at sentencing. (Pet. App. 94a)

On federal habeas-corpus review, the district court (Campbell, J.) conducted an evidentiary hearing and granted the writ as to petitioner's sentence, based on ineffective assistance of counsel, but otherwise denied relief. (Pet. App. 155a)[2] On appeal, a divided Sixth-Circuit panel affirmed the judgment upholding petitioner's conviction but reinstated petitioner's death sentence; the court agreed with the state courts that petitioner had not been prejudiced at sentencing by his counsel's deficient performance. (Pet. App. 90a, 117a) *See Jones v. State*, No. 01C01-9402-CR-00079, 1995 WL 75427, at *2. This Court denied certiorari on October 9, 2001. *Abdur'Rahman v. Bell*, 534 U.S. 970 (2001).

At that point, the case was over—petitioner had exhausted his available avenues of appeal. But relying upon a state-court rule promulgated in 2001, petitioner returned immediately to the district court and filed a motion under Fed. R. Civ. P. 60(b) seeking to reopen several of the prosecutorial misconduct claims that had previously been denied on procedural default grounds. That motion was denied, and the Sixth-Circuit mandate issued on February 11, 2002. But an identical motion was filed on December 12, 2002 (C. A. Pet. App. 134), and litigation on that motion ensued for the next six years, *see, e.g.*, *Bell v. Abdur'Rahman*, 545 U.S. 1151 (2005) (granting certiorari, vacating, and remanding for further consideration); petitioner ultimately succeeded in reopening these claims when

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[2] This ruling included the determination that several claims of prosecutorial misconduct had not been exhausted in state court and thus were procedurally defaulted. (Pet. App. 167a, 182a)

the district court granted his motion on May 7, 2008. (R. 322, Order)

After additional briefing, however, the district court (Campbell, J.) found no merit to any of these claims. (Pet. App. 33a, 89a) The court also denied a certificate of appealability (R. 335, Order) and a motion to alter or amend judgment. (R. 340, Order) As pertinent here, the district court's denial of relief included petitioner's claim that the prosecution had failed to disclose co-defendant Harold Miller's oral statements about the Southeastern Gospel Ministry ("SEGM") made to the prosecution during pre-trial interviews. (Pet. App. 46a)[3] The court determined that petitioner "ha[d] failed to show that any failure to disclose was prejudicial to Petitioner as he either already was aware of the asserted information and disclosed it to defense counsel, or he ultimately contradicted the assertions during his sentencing hearing testimony." (Pet. App. 50a) The court detailed the record evidence "indicat[ing] that defense counsel was aware of the involvement of SEGM prior to trial," including his "suggest[ion] to the prosecutor that he might call him as a witness to testify about the Petitioner's relationship with SEGM"; petitioner's sentencing-phase testimony about the SEGM; and petitioner's statements on cross-examination "that he was not suggesting that SEGM turned him into a murderer" and "that other members of the group . . . were not involved in the crimes." (Pet. App. 50a-51a) "Based on

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[3] The Southeastern Gospel ministry was a religious group to which both petitioner and Miller belonged. (Pet. App. 11a) The district court's denial of relief also included two other claims involving petitioner's argument relating to the SEGM. (Pet. App. 62a-69a, 85a-89a)

this record," the district court determined that it was "not persuaded that Miller's statements about SEGM are more significant than the information that defense counsel already possessed." (Pet. App. 51a)

The district court also denied relief on petitioner's claim that the prosecution failed to disclose a portion of the report of Detective Mark Garafola reflecting his activities on the day of petitioner's arrest, which indicated that petitioner had banged his head against a wall while in custody. (Pet. App. 55a) The court determined that it was "not persuaded that any failure of defense counsel in pursuing a mental health defense or mitigation can be attributed to the lack of notice that Petitioner banged his head on the wall when he was taken into custody." (Pet. App. 56a) Accordingly, the court concluded that petitioner had failed to establish materiality with respect to this evidence. (Pet. App. 57a)

After granting a partial certificate of appealability on these two claims (Pet. App. 238a), the same divided Sixth-Circuit panel affirmed the judgment of the district court.[4] As to the claim involving Miller's statements, the court agreed that petitioner knew the essential facts reflected in Miller's pre-trial statements; indeed, as the district court had observed, "[petitioner's] testimony repeated the substance of Miller's pre-trial statements." (Pet. App. 11a)[5]

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[4] Petitioner appealed the judgment only as to its impact on the validity of his sentence. (Pet. App. 10a, 14a)

[5] As the Sixth Circuit also noted, petitioner's counsel considered calling Miller as a witness at sentencing, but did not. (Pet. App. 11a)

"Because [petitioner] already knew of the exculpatory information in Miller's statements, there was little remaining for the prosecution to disclose." (Pet. App. 12a) Addressing petitioner's additional argument on appeal that the value of Miller's statements was "not what was said, but rather that Miller said them," the court found that petitioner also "knew that Miller had discussed the SEGM with the prosecution before trial." (Pet. App. 12a)

> Given what [petitioner] already knew about the SEGM and its influence, the prosecution's acknowledgement that Miller discussed the SEGM with it before trial provided [petitioner] sufficient information to enable him to impeach the credibility of Miller's testimony at trial. [Petitioner's] decision not to do so was not the fault of the prosecution. Accordingly, the district court did not err in concluding that the prosecution's nondisclosure of Miller's pre-trial statements did not violate *Brady*.

(Pet. App. 12a-13a (internal citations omitted))

As to the claim involving Detective Garafola's report, the court held that "[b]ecause the prosecution's suppression of this part of Detective Garafola's report does not undermine our confidence in [petitioner's] sentence, the district court did not err in rejecting [this] second *Brady* claim." (Pet. App. 15a) Although petitioner had argued that the report could have been used to show "that [petitioner] was 'seriously mentally ill when he was arrested,'" the court found that "it would have done little to establish [petitioner's] mental illness."

> Head banging like [petitioner's] could be a manifestation of many things (including frustration, anger, sadness, or mental illness) and therefore, in and of itself, is hardly dispositive of mental illness. . . . The addition of Detective Garafola's report adds little to [petitioner's] narrative that he was mentally ill, and had it been presented, the prosecution could have rebutted it with considerable expert testimony to the contrary.

(Pet. App. 17a) The court's conclusion "remain[ed] unchanged, even when considering materiality in light of any prejudice arising from the suppression of the 1972 murder trial transcript." (Pet. App. 18a)[6] "Although both items allegedly relate to [petitioner's] mental health history, neither is especially strong evidence, and the combined effect of them by no means tends to 'put the whole case in a different light as to undermine confidence in the verdict.'" (Pet. App. 19a (citing *Cone v. Bell*, 556 U.S. 449, 470 (2009))).

The court also rejected petitioner's attempt to argue cumulative trial error, specifically, his argument that

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[6] The court recognized that materiality of alleged *Brady* evidence required consideration of the cumulative effect of all undisclosed evidence. (Pet. App. 16a) The district court had previously found that the transcript of petitioner's 1972 murder trial was favorable and not disclosed but that it was not material. (Pet. App. 18a-19a) See Pet. App. 187a. (The petition, however, misstates the district court's reasons for finding the transcript favorable. Compare Pet. 6 with Pet. App. 187a; see also Pet. App. 215a.) The Sixth Circuit did not include Miller's statements about the SEGM in this calculus, because it considered these statements not to be "undisclosed." (Pet. App. 16a)

his *Brady* claims should be cumulated with his *Strickland* ineffective-assistance claims and with his other prosecutorial-misconduct claims for purposes of assessing prejudice. (Pet. App. 6a-7a) Because this cumulative-error argument constituted a separate claim that must be presented in state court and was subject to procedural default, the court held that petitioner was barred from asserting it because he had only raised it for the first time in his federal habeas petition. (Pet. App. 7a)[7]

Petitioner now seeks this Court's review.

REASONS FOR DENYING REVIEW

I. THIS CASE PROVIDES NO OPPORTUNITY TO ADDRESS QUESTION 1 OF THE PETITION; PETITIONER'S CUMULATIVE-ERROR CLAIM IS PROCEDURALLY DEFAULTED AND THUS BARRED FROM REVIEW.

With Question 1, petitioner asks this Court to consider when "'cumulative error' is a legally permitted basis for relief on federal habeas corpus." But as the Sixth Circuit unanimously held (Pet.App. 7a, 30a), petitioner's cumulative-error claim is procedurally defaulted for failure to raise it in state court; it is therefore barred from federal habeas corpus review. 28 U.S.C. § 2254(b); *Gray v. Netherland*, 518 U.S. 152, 162 (1996). This case thus provides no

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[7] On this point, the dissent "agree[d] with the majority that [petitioner] procedurally defaulted the *Strickland/Brady* claim by failing to raise it in state court." (Pet. App. 30a)

vehicle for this Court to address Question 1. Petitioner seeks to overcome this obstacle by purporting to make the procedural default issue part of the question he presents; he makes the dual—and self-contradicting—suggestion that while cumulative error provides a basis for granting habeas relief, it is not a *claim* for habeas relief that must first be exhausted in state court. But there is no reason for the Court to take up this particular issue.

There can be no genuine debate—least of all from petitioner[8]—that where cumulative error (the cumulative effect of multiple trial errors) is urged as a basis for granting habeas relief, it constitutes a *claim* for habeas relief. *See, e.g.*, Rachel A. Van Cleave, *When Is an Error Not an "Error"? Habeas Corpus and Cumulative Error Analysis*, 46 Baylor L. Rev. 59, 85 (1994) ("[C]ertainly an allegation that one has been deprived of a fair trial is a constitutional claim. Cumulative error analysis usually centers on the fairness of the trial, and thus *constitutes a claim* that the petitioner has been denied due process under the Fourteenth Amendment.") (emphasis added). Nor can it be seriously argued that a cumulative-error claim is somehow exempt from the requirement that a federal habeas petitioner first exhaust all his claims in state court or from the corresponding rule that claims that are not properly presented to the state courts are

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[8] Petitioner's habeas petition listed six main "grounds for relief," lettered A through F. His cumulative-error claim appeared as section "B. General Due Process Violation; Cumulative Effect of Violations." (C. A. Pet. App. 50, 60) Petitioner later took the position that this claim for relief was not really a claim for relief, only after having been confronted with his failure to exhaust and consequent default of this claim. (Pet. App. 170a n.10)

procedurally barred from federal habeas review. *Gray*, 518 U.S. at 162; *Rose v. Lundy*, 455 U.S. 509, 518-520 (1981).

Exhaustion is required of every legal ground advanced for federal habeas relief. *Anderson v. Harless*, 459 U.S. 4, 6-7 (1982); *Picard v. O'Connor*, 404 U.S. 270, 275-76 (1971). The exhaustion requirement provides habeas petitioners with a "simple and clear instruction": "before you bring any claims to federal court, be sure that you first have taken each one to state court." *Lundy*, 455 U.S. at 520. Here, petitioner brought his cumulative-error argument to the attention of the federal courts, but it "was never brought to the attention of the state courts." *Picard*, 404 U.S. at 276. It would defy this Court's precedents, not to mention the comity interests that lie at the heart of the exhaustion requirement, *see Lundy*, 455 U.S. at 515, to accept petitioner's premise: that he is entitled to seek federal habeas relief from his sentence on the basis of a cumulative-error claim—one asserting the *combined effect* of an alleged Fourteenth-Amendment *Brady* violation and an alleged Sixth-Amendment *Strickland* violation, no less—without having first presented that claim to the state court.[9] Indeed, petitioner cites *not one* circuit-

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[9] Petitioner tends to conflate the various kinds of "cumulative-error" arguments (Pet. 15, 18), but a distinction should be recognized here between the cumulative-error claim petitioner raised in this case, i.e., a claim seeking relief on the basis of the combined effect of *distinct* legal claims, and a claim based on the cumulative effect of *like* errors, e.g., the cumulative effect of multiple attorney errors under *Strickland* or the cumulative effect of multiple pieces of withheld evidence under *Kyles v. Whitney*, 514 U.S. 419 (1995).

court decision that so holds, and respondent has found none. *Cf. Gonzalez v. McKune*, 279 F.3d 922, 925 (10th Cir. 2002) (finding *Strickland-Brady* cumulation claim procedurally defaulted; "[t]o grant Gonzalez relief now, on the basis of an argument that he failed (without explanation) to present to the relevant state court, would be contrary to 28 U.S.C. § 2254(b)(1).").[10]

Petitioner asserts nonetheless that the Fifth and the Third Circuits apply a different rule and that these courts would consider his cumulative-error claim on the merits (Pet. 14-15). But the cases on which petitioner relies do not bear him out. *Derden v. McNeel*, 978 F.2d 1453 (5th Cir. 1992) (en banc), is decidedly *not* a case in which the Fifth Circuit allowed "a habeas petitioner to raise a cumulative error argument without first making that argument before the state court below." (Pet. 14)[11] Neither is *Hughes v. Dretke*, 412 F.3d 582, 597 (5th Cir. 2005).

In *Derden*, the court did address the merits of a cumulative-error claim, to be sure, but it did so only after *the claim had first been presented to the state court*, as revealed by an opinion from the original panel decision in that case. *See Derden v. McNeel*, 938 F.2d 605, 618 (5th Cir. 1991) (Jones, J., dissenting) ("When Derden appealed his conviction for armed

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[10] Although *Gonzalez* is a post-AEDPA case, the exhaustion requirement was codified in 28 U.S.C. 2254 in 1948 and "existed long before its codification." *Lundy*, 455 U.S. at 515, 516.

[11] Petitioner quotes the Sixth Circuit in this respect, so the Sixth Circuit was actually wrong about this too. Petitioner first cited *Derden* to the Sixth Circuit in his reply brief; respondent thus had no opportunity then to address it.

robbery to the Mississippi Supreme Court, he contended that fundamental fairness was violated by the cumulative effect of many of the alleged trial errors raised here."). And in *Hughes*, the court applied *Derden* to find a cumulative-error claim procedurally barred (because some of the underlying claims had not been presented in state court), but, again, it did so only after a cumulative-error claim had in fact been presented to the state court, as revealed by the state-court opinion in that case. *See State v. Hughes*, 24 S.W.3d 833, 844 (Tex. Crim. App. 2000).[12]

Derden's holding that a cumulative-error claim may not include individual errors that are themselves procedurally barred, 978 F.2d at 1458, does not mean that the Fifth Circuit addresses cumulative-error claims without regard to their exhaustion. *See, e.g., Taylor v. Cain*, 190 F.3d 538, 1999 WL 642890, at *10 (5th Cir. Jul. 29, 1999) (unpublished) (expressly noting that "Taylor first raised this [cumulative-error] argument in his direct appeal to the Louisiana Supreme Court" and denying certificate of appealability on the basis of the correctness of the state court ruling).[13] As *Hughes* shows, this part of the

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[12] In its habeas answer in *Hughes*, the state asserted that "[w]hile Hughes raised a claim of cumulative error on direct appeal, . . . the instant claim of cumulative error is a combination of claims raised on direct appeal, claims raised during state habeas proceedings, and claims that have never been raised to the state courts." Answer at 42, *Hughes v. Dretke*, No. 3-00-cv-2033, 2004 WL 549480 (N.D.Tex. Mar. 18, 2004), ECF No. 16.

[13] *See also Harris v. Estelle*, 487 F.2d 1293, 1299 (5th Cir. 1973) (vacating decision on cumulative-error claim and dismissing without prejudice because the claim "ha[d] never been presented to the Texas courts").

Derden decision means that the cumulative-error claim presented in federal court must match the one presented to the state court. *See Picard*, 404 U.S. at 276 (state prisoner must "present the state courts with the same claim he urges upon the federal courts").

Nor does *Albrecht v. Horn*, 485 F.3d 103 (3d Cir. 2007), show any different treatment of cumulative-error claims. While the court in *Albrecht* did observe that "[t]he state courts did not address a claim of cumulative prejudice . . . , " it then went on to say, "and thus no deference is owed under 28 U.S.C. 2254(d)(1)." 485 F.3d at 139 n.17. The question whether a federal habeas claim was *addressed* by a state court is, of course, very different from the question whether a federal habeas claim was *presented* to a state court. *See Smith v. Dignon*, 434 U.S. 332, 333 (1978); *see also Pursell v. Horn*, 187 F.Supp.2d 260, 288 (W.D.Pa. 2002) ("To satisfy the exhaustion requirement, a claim need not be actually decided by the state courts."). Nothing in *Albrecht* suggests that the court was abandoning or modifying the rule—restated in its opinion—that a habeas petitioner must fairly present his claims to the state court. 485 F.3d at 115. Indeed, one year after *Albrecht*, in *Fahy v. Horn*, 516 F.3d 169 (3d Cir. 2008), the Third Circuit addressed the merits of a habeas petitioner's cumulative-error claim only after expressly finding that it was "not barred by procedural default." 516 F.3d at 189.

These decisions show that petitioner's mere ability to cite cases that "reach the merits of habeas petitioners' cumulative error arguments"—but happen not to include discussions of exhaustion—does not mean that the Third and Fifth Circuits apply a

different rule for cumulative-error claims. (Pet. 14-15)[14] Other cases indicate that courts in these circuits treat such claims as they do any other claim for habeas relief. *See, e.g.*, *Marshall v. Hendricks*, 307 F.3d 36, 94 (3d Cir. 2002) (where state court had addressed and rejected a cumulative-error claim, court affirmed on basis that state court had not unreasonably applied federal law); *Jordan v. Epps*, 740 F.Supp.2d 802, 898-99 (S.D. Miss. 2010) (finding state court's rejection of cumulative-error claim not unreasonable); *McGowen v. Thaler*, 717 F.Supp.2d 626, 671 (S.D. Tex. 2010) ("[f]ederal review of [the cumulative-error] claim is barred as [petitioner] has not exhausted it; *Garcia v. Thaler*, No. SA-08-CA-62-XR, 2009 WL 4931069, at *18 (W.D.Tex. Dec. 14, 2009) ("Petitioner did not present his 'cumulative error' claim to the state courts . . . . However, respondent does not raise petitioner's failure to exhaust state remedies as a basis for denying petitioner's cumulative error claim."); *Pursell*, 187 F.Supp.2d at 288, 297 ("There is no doubt that Pursell has satisfied the exhaustion requirement" by presenting his cumulative-error and other claims to state court; these claims were not procedurally defaulted because state procedural rule was not firmly established).[15]

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[14] In one of the district-court cases petitioner cites, for example, *Johnson v. Louisiana*, No. 03-cv-00276, 2005 WL 47392 (E.D. La. Jan. 21, 2005), the underlying report and recommendation includes the following finding: "Johnson has exhausted his state court remedies and the State does not contest this issue." Report and recommendation at 3, *Johnson v. Louisiana*, No. 03-cv-00276 (E.D.La. 2005 WL 47392 (E.D.La. Jan. 21, 2005), ECF No. 18.

[15] Still other cases show that courts in the First, Seventh, and Eleventh Circuits also treat cumulative-error claims as they do any other claim (joining the Second, Sixth, Ninth, and Tenth

II. QUESTION 2 WAS NOT PROPERLY RAISED BELOW, AND ITS PREMISE DOES NOT REFLECT THE FACTS IN THIS CASE. THE DECISION OF THE SIXTH CIRCUIT DOES NOT CONFLICT WITH THIS COURT'S PRECEDENTS, AND THERE IS NO CIRCUIT SPLIT.

A. Question 2 Was Not Properly Raised Below, and Its Premise Is Wrong.

With Question 2, petitioner asks this Court to consider whether a distinction should be drawn for *Brady* purposes between the *facts* known to a defendant and the *evidence* of those facts (Pet. 21), suggesting that the Sixth Circuit failed or refused to recognize such a distinction. (Pet. 22) This question,

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Circuits (Pet. 14)). *See, e.g., Clements v. Mahoney*, 485 F.3d 158, 168 & n.14 (1st Cir. 2007) (affirming district-court ruling that "these four claims [including a cumulative-error claim] . . . were not exhausted"); *Jones v. McNeil*, 776 F.Supp.2d 1323, 1368-69 (S.D.Fla. 2011) ("this [cumulative-error] claim is unexhausted and procedurally barred from further review"); *Greene v. Pollard*, 677 F.Supp.2d 1073, 1100 (W.D.Wis. 2009) ("Because petitioner did not raise [cumulative-error] claim in his petition or in the state courts, he has defaulted it."); *Edwards v. Ryker*, 520 F.Supp.2d 941, 953 (N.D.Ill. 2007) ("Although petitioner raised this [cumulative-error] claim in his post-conviction petition, he did not raise it in his post-conviction appeal. This claim is thus procedurally defaulted . . . ."); *Williams v. Anderson*, 174 F.Supp.2d 843, 876 (N.D.Ind. 2001) ("As [petitioner] failed to make this [cumulative-error] claim before the Indiana Supreme Court, he has procedurally defaulted this claim."); *Kurina v. Theirot*, 659 F.Supp. 1165, 1170 n.7 (1987), *affirmed* 853 F.2d 1409 (7th Cir. 1988) (noting "probable waiver" of "combined-effects" claim for failure to present it to state court but also noting state's failure to rely on waiver defense)

however, was not properly raised below. Petitioner relies here on the Sixth Circuit's resolution of his *Brady* claim alleging the suppression of co-defendant Harold Miller's oral statements to the prosecution during pre-trial interviews.[16] But this claim, as it was presented in petitioner's habeas petition and litigated, argued, and decided in the district court, alleged only the suppression of the *facts* contained in those statements.

As it appeared in petitioner's habeas petition, this claim alleged that prosecutors had withheld "Miller's statements to the prosecution regarding the involvement of the SEGM in the alleged offense." (C. A. Pet. App. 60). The claim specifically alleged that "[t]his *information* is exculpatory and would have been relevant," that "it was never disclosed to the defense," and that "[t]his *information* likely included . . . the following *facts*"; it then set forth several factual bullet points regarding Miller, petitioner, and the SEGM. (*Id*. (emphasis added). This was the claim before the

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[16] Petitioner also relies with respect to Question 2 on his claim alleging the suppression of a portion of the police report of Detective Mark Garafola. (Pet. 22) As to this claim, the Sixth Circuit stated: "As an initial matter, we are not convinced that, at the time of the sentencing phase, Abdur'Rahman did not know the essential facts of the behavior described in Detective Garafola's report." (Pet. App. 14a) But the district court had denied this claim because petitioner "failed to establish materiality in connection with [it]" (Pet. App. 57a), and the Sixth Circuit went on to hold that "[b]ecause the prosecution's suppression of this part of Detective Garafola's report does not undermine our confidence in [petitioner's] sentence, the district court did not err in rejecting the second *Brady* claim." (Pet. App. 15a) The *holding* of the Sixth Circuit on this claim, therefore, is not implicated by Question 2.

district court at the time of the evidentiary hearing in 1998; it was the claim petitioner argued to the district court both before and after the claim was ruled defaulted in 1998 and then reopened in 2008; and it was the claim the district court denied on the merits in 2009. See Pet. App. 49a (describing this claim as "the alleged failure of the prosecutor to disclose the asserted information [about the SEGM]").

Petitioner now concedes that he was aware of the facts reflected in Miller's statements (Pet. 23) and turns to rely exclusively on the argument he added in the Sixth Circuit—that the value of Miller's statements "is not what was said, but rather that Miller said them." (Pet. App. 12a) He says that he raised this argument in the district court by including it in his December 18, 2008 reply brief. (Pet. 27 n.6) But an argument is not properly raised by presenting it for the first time in a reply brief. *United States v. Perkins*, 994 F.2d 1184, 1191 (6th Cir. 1993); *see Johnson v. Wyndham Hotels and Resorts, LLC*, No. 2:10-cv-0037, 2011 WL 1930557, at *4 (M.D.Tenn. May 19, 2011). The Sixth Circuit acknowledged that petitioner "may have waived this particular argument for purposes of appeal" (Pet. App. 10a n.2),[17] but the court elected to consider it anyway. So respondent is not asserting that this Court *cannot* review Question 2, but a mutating claim that was not properly raised and thus not fully addressed below seems an odd candidate for this Court's attention.

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[17] In the Sixth Circuit, respondent addressed only the claim presented in the habeas petition and decided by the district court, insisting that any other argument was not a proper part of the claim. (C. A. Br. Resp., at 12 n.6).

Besides, Question 2 is not actually presented here. The Sixth Circuit did not fail to recognize the distinction to which petitioner now points; there is simply no such distinction to be drawn in this case. Two points explain why. First, petitioner wrongly asserts (and Question 2 wrongly assumes) that he "was aware only of the underlying facts reflected in Miller's statements." (Pet. 23) Petitioner knew more than that. He knew Miller, of course; he knew that Miller knew these same facts about the SEGM; and he "knew that Miller had discussed the SEGM with the prosecution before trial." (Pet.App. 11a, 12a) Miller's statements were oral; there were no "reports" in the government's possession (Pet. 26) and no other contemporaneous record made of them. (Pet. App. 9a) Under these circumstances, petitioner's assertion that he was not aware of "the existence and content of the statements themselves" (Pet. 23) rests on the subtlest of nuances. And the remainder of Question 2's premise is also wrong. Petitioner was *not* prevented from presenting evidence about the SEGM. Given all of what petitioner knew, he was fully able to elicit testimony from Miller about the SEGM and thus "prove those facts to the jury." (Pet. 23) "[His] decision not to do so was not the fault of the prosecution." (Pet. App. 13a)

Second, petitioner's contention that Miller's pre-trial statements "flatly" and "directly" contradicted his trial testimony (Pet. 4, 22) is not supported by the record. Petitioner's defense theory at trial was that he went to the victim's home to frighten him, not to rob him. (Pet. 4) Here, petitioner creates the impression that in these statements Miller, too, told the prosecution that petitioner and he went to the victim's home only to scare him, as part of an effort by SEGM,

and not to rob him, but that Miller then turned around and testified at trial to exactly the opposite: "that petitioner and he went to the victim's apartment to rob him, not as part of any effort by the SEGM." (Pet. 4, 22, 26) But this is not what happened. Testimony from Miller's sentencing hearing—the evidence from which petitioner partly derives the substance of Miller's pre-trial statements (Pet. App. 9a)—clearly reflects that petitioner and he went to the victim's home to rob him. See Pet. App. 66a (Q: "When you went to the place, the home of Norma Norman and Patrick Daniels, you knew that a robbery was going to occur? A: Yes."). As the district court found when it rejected a related claim,[18] Miller's trial testimony was *not* contradictory; "Miller's sentencing hearing testimony indicates that while the ultimate goal may have been to rid the community of drug dealers, he *still intended to rob the victims*, and to eliminate witnesses." (Pet. App. 68a (emphasis added))[19]

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[18] The district court denied relief on petitioner's claim that the prosecution presented false evidence by presenting Miller's testimony, where petitioner likewise argued that Miller's sentencing-hearing and post-conviction testimony "contradicts [his] trial testimony that he and the Petitioner planned to rob Daniels." (Pet. 68a)

[19] The prosecution did not elicit trial testimony from Miller regarding the SEGM, and petitioner might say that *this* is why his pre-trial statements "contradicted" his trial testimony. But if this is the real argument, why make it appear to be something else? And if petitioner's real complaint is that Miller's trial testimony included no mention of the SEGM, petitioner knew that too, and he had the ability to elicit additional testimony from Miller about the SEGM's role. Miller did not deny any role by the SEGM, contrary to petitioner's suggestion (Pet. 4); indeed, petitioner elicited Miller's testimony that SEGM member William Beard had supplied his gun. (Pet. App. 68a) If petitioner had asked Miller

B. The Decision of the Sixth Circuit Does Not Conflict With this Court's Precedents, and There Is No Circuit Split.

Petitioner says that the Sixth-Circuit decision here conflicts with this Court's precedents (Pet. 26). It does not. While it may be fair to say that the defendant in *Cone v. Bell*, 556 U.S. 449 (2009), "would certainly have been aware" of his own drug use (Pet. 27), the defendant in that case was certainly *not* aware of the information contained in the witness statements that had been withheld, namely, those witnesses' perceptions of the defendant's conduct and appearance around the time the crimes were committed. *See id*. at 471. Unlike the situation here, the withholding of the statements in *Cone did* prevent the defendant from being able to present *those* facts to the jury.

In *Youngblood v. West Virginia*, 547 U.S. 867 (2006) (per curiam), the defendant did not know that two prosecution witnesses had written a note that "squarely contradicted" the account of events they had given in their trial testimony. *Id*. at 868. Although the defendant would have known the truth about what had occurred, the note itself was significant because it was the defendant's only means of presenting this version of events to the jury, other than by his own testimony. And in *Brady*, although the defendant would have known the truth about whether he or the co-defendant had committed the actual killing, he did

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additional questions about the SEGM and Miller *had* denied what he had said to the prosecution, *then* the contention would be justified that these pre-trial statements contradicted his trial testimony.

not know that the co-defendant had confessed to the killing; because the two defendants were tried separately, 373 U.S. 83, 84, the confession itself was significant because it was the defendant's only means of presenting the facts to the jury, other than by his own testimony. Here, though, petitioner knew that Miller had discussed the SEGM with the prosecution, and Miller's oral statements had no significance beyond the information contained in them—information that petitioner now admits he already knew and that could have been presented through testimony from Miller.

The situations in which the *Brady* rule applies "involve[] the discovery, after trial, of information which had been known to the prosecution but unknown to the defense." *United States v. Agurs*, 427 U.S. 97, 103 (1976). *See also Giles v. Maryland*, 386 U.S. 66, 96 (1967) (White, J., concurring) ("In the end, any allegation of suppression boils down to an assessment of what the State knows at trial in comparison to the knowledge held by the defense."). The Sixth-Circuit decision here does not conflict with this Court's precedents; indeed, the rule it applied here finds its source in *Agurs*. *See Apanovitch v. Houk*, 466 F.3d 460, 474 (6th Cir. 2006) (quoting *Agurs*, 427 U.S. at 103); *cf. Bell v. Bell*, 512 F.3d 223, 235 (6th Cir. 2008) (en banc) (distinguishing cases involving "information known to investigating officers that defendants had no reason to know about and that could not have been discovered").

Nor is there an "opposite rule" in the Third, Fourth, Ninth, Tenth, and Eleventh Circuits, as petitioner suggests. (Pet. 22) All of these circuits embrace the proposition that the *Brady* rule is not violated by the

nondisclosure of evidence that was within the knowledge of the defendant. *See United States v. Jeffers*, 570 F.3d 557, 573 (4th Cir. 2009) ("where exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have looked, a defendant is not entitled to the benefit of the *Brady* doctrine") (quoting *United States v. Wilson*, 901 F.2d 378, 381 (4th Cir. 1990)); *United States v. Erickson*, 561 F.3d 1150, 1163 (10th Cir. 2009) ("a defendant is not denied due process by the government's nondisclosure of evidence if the defendant knew of the evidence anyway"); *United States v. Bond*, 552 F.3d 1092, 1095-96 (9th Cir. 2009) ("where the defendant has enough information to be able to ascertain the supposed *Brady* material on his own, there is no suppression") (quoting *United States v. Aichele*, 941 F.2d 761, 764 (9th Cir. 1991)); *United States v. Pelullo*, 399 F.3d 197, 213 (3d Cir. 2005) ("*Brady* does not compel the government to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself") (quoting *United States v. Starusko*, 729 F.2d 256, 262 (3d Cir. 1984)) (internal quotation marks omitted); *Maharaj v. Sec'y for Dept. of Corrections*, 432 F.3d 1292, 1315 (11th Cir. 2005) ("where defendants, prior to trial, had within their knowledge the information by which they could have ascertained the alleged *Brady* material, there is no suppression by the government") (quoting *United States v. Griggs*, 713 F.2d 672, 674 (11th Cir. 1983)).[20]

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[20] Indeed, this appears to be a matter of general consensus among the circuits. *See State v. Mullen*, 259 P.3d 158, 166 n.5 (Wash. 2011) (en banc) (noting that "[t]he majority of the federal circuits . . . refuse to find a *Brady* violation where the defense can access the material through its own due diligence," citing cases from

The circuit-court cases petitioner cites are not to the contrary; most are just more examples of cases in which the withheld evidence itself had particular significance of which the defendant was not aware. In *United States v. Severdija*, 790 F.2d 1556 (11th Cir. 1986), for instance, in which a defendant's statement to a law-enforcement officer had been withheld, the Eleventh Circuit rejected the government's reliance on the defendant's awareness of his own statement because it "ignore[d] the independent significance of [the investigating officer's] written statement." 790 F.2d at 1559. The only issue in that case was the defendant's state of mind, and the court found that *the fact that the statement was made*, as well as the defendant's ability *to prove through a third party* that it was made, established its importance. *Id*. at 1560. "There [was] no evidence [the defendant] knew of such a recordation," and he otherwise *lacked* any means of corroborating the fact that he had made the statement other than through his own self-serving testimony. *Id*. 1559 & n.1, 1560.

In *United States v. Kelly*, 35 F.3d 929 (4th Cir. 1994), the defendant knew that the victim was involved in a cult, which was a fact important to his defense but that the victim had denied at trial. 35 F.3d at 934. The government had withheld an IRS search-warrant affidavit detailing the information known to the government about the victim's involvement with the cult, and the Fourth Circuit found the affidavit itself to be significant, despite the defendant's knowledge of the victim's cult membership, because it

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every numbered circuit, and distinguishing only the Tenth Circuit, where the due-diligence aspect is "unclear").

showed that "the Government apparently shared [this] belief"—a fact of which the defendant was not aware. *Id*. at 937. In *Government of the Virgin Islands v. Martinez*, 780 F.2d 302 (3d Cir. 1985), the defendant's own confession had been withheld, and it was *this* fact that the Third Circuit found significant. 780 F.2d at 309; *see id*. (proposition that the government need not disclose what the defendant already has or can obtain "does not apply to a request for the substance of a confession taken by police"); *see also id*. at 309-10 (discussing the "critical" importance of disclosing a defendant's confession); *but cf. Government of the Virgin Islands v. Martinez*, 831 F.2d 46, 50 (3d Cir. 1987) (on appeal after remand, court rejected the notion that defendant's knowledge of the information contained in his undisclosed confession was irrelevant under *Brady*).

United States v. Howell, 231 F.3d 615 (9th Cir. 2000), is distinguishable on a different basis. There the Ninth Circuit rejected the government's argument that the defendant's knowledge eliminated its obligation to disclose a recognized mistake in two police reports, but only because that knowledge did not extend to the defendant's *attorney*. *See id*. at 625 (citing *United States v. McElroy*, 697 F.2d 459 (2d Cir. 1982),[21] for the proposition that the availability of statements to the defendant *himself* does not negate the government's duty to disclose).[22] And although

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[21] *McElroy* was decided under Fed.R.Crim.P. 16—not under *Brady*. *See* 697 F.2d at 465.

[22] The language petitioner cites from *Howell* comes from that part of the opinion in which the court rejected the government's

petitioner cites two Tenth-Circuit cases for the proposition that a defendant's knowledge of exculpatory evidence is irrelevant to the prosecutor's obligation to disclose (Pet. 25), in the later case, *United States v. Quintanilla*, 193 F.3d 1139 (10th Cir. 1999), the court went on to add that "a defendant's independent awareness of the exculpatory evidence is critical in determining whether a *Brady* violation has occurred." 193 F.3d at 1149. *See id*. ("If a defendant already has a particular piece of evidence, the prosecution's disclosure of that evidence is considered cumulative, rendering the suppressed evidence immaterial.").[23]

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argument that the information was inculpatory and thus not subject to *Brady*. *Id.*

[23] Petitioner might say that distinguishing between suppression and materiality would matter here because the Sixth Circuit's conclusion that Miller's statements were not "undisclosed" precluded their inclusion in the court's collective-materiality assessment. *See* Pet. App. 16a. But the Tenth Circuit's distinction is one without a difference. Whether expressed in terms of suppression (because the evidence was not "undisclosed") or materiality (because the nondisclosure created no prejudice), the effect of the defendant's knowledge is the same—there is no *Brady* violation. So even if Miller's statements were deemed "suppressed," petitioner suffered no prejudice because his knowledge enabled him to elicit testimony from Miller about SEGM; there thus would be nothing to add to a collective-materiality assessment.

III. THE COURT CANNOT REACH QUESTION 3; IT CONTEMPLATES REVIEW OF AN ELEVEN-YEAR-OLD FINAL JUDGMENT.

With Question 3 of the petition, petitioner seeks this Court's review of his "long-settled" ineffective-assistance-of-counsel-at-sentencing claim (Pet. App. 30a), which the Sixth Circuit rejected more than 11 years ago as part of its September 13, 2000 final judgment denying habeas relief. (Pet. App. 91a) *See Abdur'Rahman v. Bell*, 534 U.S. 970 (2001) (denying certiorari). But the Court cannot reach this question; this ineffective-assistance claim was not before the Sixth Circuit on petitioner's appeal from the district court's January 26, 2009 judgment (Pet. App. 3a), and the instant petition for certiorari was obviously not filed within 90 days after entry of the Sixth Circuit's September 13, 2000 judgment. U.S.Sup.Ct.R. 13.1.

Petitioner says that the Court *can* consider this question, because "it 'has authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals.'" (Pet. 37 n.7 (quoting *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001)). But this Court's cases make clear that this rule applies where the earlier determinations were made as part of an *interlocutory* judgment—not where, as here, a litigant seeks a second review of an earlier final judgment in a case. *See Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 271 (1916) ("[T]his [C]ourt, in now reviewing the final decree by virtue of the writ of certiorari, is called upon to notice and rectify any error that may have occurred in the [earlier] interlocutory proceedings."); *Urie v. Thompson*, 337 U.S. 163, 171-72

(1949) (In the earlier appeal, "the [state] court remanded the cause for trial, not for dismissal. The judgment therefore was not final; it was interlocutory . . . .").[24]

Contrary to petitioner's assertion, therefore, it *does* make a difference "that the current appeal arises from a motion under Fed. R. Civ. P. 60(b)." (Pet. 37 n.7) Furthermore, the language petitioner quotes from *East Brooks Books, Inc. v. City of Memphis*, 633 F.3d 459, 465 (6th Cir. 2011), for the proposition that "a Rule 60(b) motion is considered a continuation of the original proceeding" is taken out of context. The issue in *East Brooks Books* was only whether there continued to be a case or controversy when the Rule 60(b) motion in that case was filed, and the Sixth Circuit concluded that "[i]f the district court had jurisdiction when the suit was filed, it has jurisdiction to entertain a Rule 60(b) motion." 633 F.3d at 465. Petitioner also ignores the fact that *his* Rule 60(b) motion was limited to reopening *distinct* claims, none

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[24] *See also Missouri v. Jenkins*, 515 U.S. 70, 75 (1995) (earlier appeal was part of long-running school-desegregation case in which district court retained jurisdiction to enforce remedial plan; *Garvey*, 532 U.S. at 508 (earlier appeal had reversed and remanded with instructions to vacate arbitrator's award denying player's claim); *Mercer v. Theriot*, 377 U.S. 152, 153 (1964) (earlier appeal had reversed and remanded with directions to enter judgment for defendant or, alternatively, for a new trial if plaintiff made sufficiency showing); *Hamilton-Brown Shoe*, 240 U.S. at 254 (earlier appeal had reversed and remanded with instructions to enter injunction and to make accounting of damages and profits); *Reece v. Georgia*, 350 U.S. 85, 86 (1955) (earlier appeal had reversed and remanded for a new trial); *Messinger v. Anderson*, 225 U.S. 436, 442 (1912) (two earlier appeals had remanded for new trials).

of which included his ineffective-assistance-of-counsel-at-sentencing claim. (Pet. App. 32a) *See* C. A. Pet. App. 126-27. And his related assertion that an appellate court "accordingly may consider issues that arose at an earlier stage of the proceedings" ignores the jurisdictional requirement of a certificate of appealability for habeas appeals. 28 U.S.C. § 2253(c)(3); *see Gonzalez v. Thayer*, 132 S.Ct. 641, 656 (2012); *Medellin v. Dretke*, 544 U.S. 660, 666 (2005).[25]

But even if the Court could reach this question, there would be no reason to do so, because the Sixth Circuit employed no "categorical rule" when it rejected petitioner's ineffective-assistance-at-sentencing claim. (Pet. 28) The court recognized that "*Strickland* set forth the test for determining when the ineffective assistance of counsel so prejudices a defendant that his sentence must be set aside," laid out that test, and straightforwardly applied it. Based on both the evidence presented in state court and that presented in federal court, the court agreed with the state courts that petitioner did not suffer prejudice sufficient to create a reasonable probability of a different result. (Pet. App. 112a-117a) See Pet. App. at 114a ("Based upon [its] findings of fact, the post-conviction trial court found that Petitioner did not suffer any prejudice from the deficient performance, a holding that the Tennessee Court of Criminal Appeals affirmed."). Petitioner continues to disagree with this conclusion, to be sure, as did the dissenting judge below, but even

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[25] Although petitioner filed his habeas petition before the AEDPA's effective date, the post-AEDPA version of 28 U.S.C. § 2253 applies to the appellate proceedings in this case. *Slack v. McDaniel*, 529 U.S. 473, 481 (2000).

the dissent never accused the panel majority of having "[held] categorically that an attorney's failure to present double-edged evidence can never constitute ineffective assistance." (Pet. 29) See Pet. App. 20a, 145a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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