No. 17-9535

IN THE
Supreme Court of the United States

JOHN WILLIAM KING,

Petitioner,

v.

LORIE DAVIS, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

Petitioner John William King, convicted of capital murder and sentenced to death for the horrific lynching of James Byrd, Jr., applied for a certificate of appealability (COA) to appeal four claims of ineffective assistance of counsel on which the district court denied habeas corpus relief on procedural and merits-based grounds. In a unanimous, per curiam decision, the Fifth Circuit Court of Appeals granted King a COA to appeal one claim not raised to this Court, and denied COA on the remaining issues. *King v. Davis*, 703 F.App'x. 320, 334-35 (5th Cir. 2017). In reaching this decision, the Fifth Circuit followed this Court's directive that the COA inquiry "is not coextensive with a merits analysis" and "should be decided without 'full consideration of the factual and legal bases adduced in support of the claims.'" *Id.* at 325 (quoting *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003)). This case presents the following questions:

1. Whether a writ of certiorari should issue where the lower court applied the correct standard of review on COA and King merely disagrees with the result?

2. Whether jurists of reason could debate the district court's disposition of King's claims on procedural and substantive grounds?

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BRIEF IN OPPOSITION

Petitioner John William King[1] seeks a writ of certiorari on three claims of ineffective assistance of trial counsel (IATC) on which the Fifth Circuit Court of Appeals denied him a COA—that trial counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984), in failing to (1) adequately address the future dangerousness special sentencing issue, (2) obtain a change of venue, and (3) present psychiatric evidence at both the guilt and punishment phases of trial. (Pet. 22-40). However, he fails to present any compelling reason to grant review. The district court held that, with one exception, King's claims are procedurally defaulted; that King's defaults are not excused under *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013); and that King failed to show the state court adjudication of the guilt-phase portion of his IATC claim regarding psychiatric evidence merited relief under 28 U.S.C. § 2254(d). Concluding that no reasonable jurist could debate the district court's procedural and merits-based decisions, the Fifth Circuit denied a COA. This Court should deny King's petition for a writ of certiorari because the Fifth Circuit's decision fully comports with AEDPA and this Court's precedent, and the district court's disposition of King's claims could not be debated by jurists of reason.

[1] Respondent Lorie Davis is referred to as "the Director."

OPINIONS BELOW

In 2006, the district court granted summary judgment in favor of the Director and denied habeas corpus relief under § 2254(d) on King's claims that were exhausted in his initial state habeas application. *King v. Dretke*, No. 1:01-CV-435 (E.D. Tex. Mar. 29, 2006); Director's Appendix (Dir. App.) A. In 2016, the district court denied habeas relief on King's remaining claims. *King,* 2016 WL 3467097 (E.D. Tex. June 23, 2016); Pet. App. C. The Fifth Circuit granted King a COA to appeal an IATC claim challenging counsel's presentation of a case for actual innocence and denied a COA on the IATC claims raised here. *King v. Davis*, 703 F.App'x 320 (5th Cir. 2017); Pet. App. B. The Fifth Circuit affirmed the denial of relief on King's actual-innocence IATC claim, and later denied rehearing. *King v. Davis*, 883 F. 3d 577 (5th Cir. 2018); Pet. App. A.

STATEMENT OF THE CASE

I. Facts of the Crime

The facts of the capital crime are detailed in the opinions below.[2] In brief, the evidence proved that James Byrd, Jr. was going home from a party in Jasper, Texas, around 1:30 or 2:00 a.m. on June 7, 1998, when he accepted a ride from three white men in an old pickup truck. The next morning, Jasper police discovered Mr. Byrd's dismembered body. His torso, legs, and left arm

[2] E.g., Pet. App. A at 5-7; Pet. App. B at 4; Pet. App. C at 1-5.

were found in front of a church on Huff Creek Road outside of Jasper. Following a trail of smeared blood and drag marks, officers found the detached upper portion of Mr. Byrd's body about a mile and a half away in a ditch.

The bloody trail continued another mile and a half down Huff Creek Road and onto a dirt logging road, ending at a grassy area where a fight appeared to have occurred. Police found a variety of items there, including a cigarette lighter belonging to King engraved with the words "KKK" and "Possum," a cigarette butt with King's DNA on it, a wrench inscribed with the name "Berry," and several items stained with the victim's blood. The condition of Mr. Byrd's body, its location, and the other physical evidence led the forensic pathologist to conclude that his injuries were consistent with having his ankles chained together and being dragged behind a vehicle.

Police identified the pickup truck as belonging to Shawn Berry, arrested Berry, and impounded his truck. Officers searched Berry's apartment, which he shared with King and Lawrence Russell Brewer, and confiscated King's drawings and writings, and clothing and shoes of each of the three roommates. The victim's DNA was found in bloodstains on the shoes worn by all three men, on clothing worn by Berry, underneath Berry's truck, on one of the truck's tires, and on a spare tire in the bed of the truck. Police also recovered a 24-foot logging chain that matched the rust stains in the bed of Shawn Berry's truck.

The chain was found in a large hole covered by plywood and debris in the woods behind the home of a mutual friend of the roommates.

II. Judicial Proceedings

A. Indictment and pre-trial

The State of Texas charged King with capital murder. (ROA.6157).[3] The indictment alleged that on or about June 7, 1998, King "did then and there intentionally while acting together with Lawrence Russell Brewer and Shawn Allen Berry and while in the course of committing or attempting to commit kidnapping, of James Byrd, Jr., did cause the death of James Byrd, Jr. by dragging him on a road with a motor vehicle[.]" (ROA.6157).

King's attorneys during his trial were C. Haden "Sonny" Cribbs, Jr. and Brack Jones. As relevant to the questions presented, in preparing for trial, lead counsel Haden Cribbs, Jr. attempted to "discover and develop any evidence of mental illness, insanity, or mental defects which might have excused Mr. King from criminal responsibility or mitigated punishment." (ROA,10036-10037). King's attorneys filed ex parte motions for funding for a prison and racial gang expert (ROA.6458-461), investigators (ROA.6462-466), and mental health experts (ROA.6467-70), and each request was granted. (ROA.6405-408).

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[3] "ROA" is the record on appeal filed in the Fifth Circuit. It includes the pleadings, orders, and other documents filed during federal habeas litigation, and the state-court record for King's trial, direct appeal, and two state habeas applications.

Defense counsel obtained the services of two forensic psychologists, but not a psychiatrist. (*See* ROA.10037-10038). Dr. Curtis Wills of the Wilmington Institute interviewed King but "could only advise" that King "was intelligent, able to converse regarding his circumstances, and showed no evidence of any insanity, mental illness or any mental disability." (ROA.10037). Later, Dr. Walter Quijano and two associates evaluated King but "also found no evidence of insanity, mental illness or mental disability." (ROA.10038). Neither expert was called to testify at guilt/innocence.[4] The defense team did not challenge King's competency to stand trial and did not raise an insanity defense.

Defense counsel also moved for a change of venue alleging King could not get a fair trial due to widespread, inflammatory, and prejudicial publicity. (ROA.6245-6251). The trial court held a hearing on King's motion on December 14, 1998 (ROA.6684-6806), and denied relief. (ROA.6284). King re-urged the motion at the start of trial, but his request was denied. (ROA.8167-8168).

B. King's conviction

The Fifth Circuit gave detailed accounting of the evidence at trial in its 2018 decision affirming the denial of habeas corpus relief:

> At King's trial, the State introduced all the previously mentioned physical evidence, as well as evidence showing King's violent hatred of black people. During his first stint in prison (which ended about a year before Byrd was killed), King was the

[4] Dr. Quijano testified at punishment that King posed less of a risk for future danger because "there is no issue of mental illness." (ROA.9435).

"exalted cyclops" of the Confederate Knights of America (CKA), a white-supremacist gang. King's drawings displayed scenes of racial lynching. Several witnesses testified that King would not go to a black person's house and would leave a party if a black person showed up. King also had several prison tattoos. Among them were a burning cross, a Confederate battle flag, "SS" lightning bolts, a figure in a Ku Klux Klan robe, "KKK," a swastika, "Aryan Pride," and a black man hanging by a noose from a tree.

The State also put on evidence of King's larger ambitions. The State introduced King's writings, which indicated that King wished to start a CKA chapter in Jasper. The writings also indicated that King was planning for something big on July 4 (a little less than a month after the killing occurred). In prison, King spoke with other inmates about his goal of starting a race war, and about initiating new members to his cause by having them kidnap and murder black people. He wrote a letter to a friend about his desire to make a name for himself when he got out of prison. A gang expert, who reviewed King's writings, said that King's use of persuasive language showed he sought to recruit others to his cause. The expert also testified that where Byrd's body was ultimately left—on a road in front of a church rather than in the surrounding woods—demonstrated that the crime was meant to spread terror and gain credibility.

King did not testify at his trial. But his version of events was introduced by the State through a letter he sent from jail to the Dallas Morning News. In that letter, King professed his innocence. He explained that his Possum lighter had been misplaced a week or so before he was arrested. He also presented his account of the night, pinning the murder on Shawn Berry and implying that the murder was the result of a steroid deal gone wrong. He admitted that he, Shawn Berry, and Brewer were drinking and driving around in Berry's truck on the night of the killing, but explained that he and Brewer had told Berry to drop them off at the apartment. Heading home, Berry spotted Byrd walking on the side of the road. Berry and Byrd, according to King, knew each other from county jail, and Byrd had sold Berry steroids in the past. After a brief exchange, Byrd hopped in the truck behind the cab. Berry explained that Byrd would ride along because the two of them "had business to discuss later." The party took a detour to a

grocery store before heading home. At the store, Berry asked Brewer for some cash "to replenish his juice, steroid supply." Brewer obliged him, and the group got back in the truck, this time with Berry and Byrd up front so that they could chat about the deal, and Brewer and King in the back. Berry dropped Brewer and King off at the apartment and then left with Byrd.

The State poked two holes in this story. First, the State adduced testimony from Lewis Berry and Keisha Atkins, King's friend, that contrary to King's story that he lost the Possum lighter a week before, he had the lighter on the night of the killing. Lewis Berry explained that King had lost his lighter, but that it had been returned to him before the night of the killing. Second, the State put on evidence that Brewer's shoe was stained with Byrd's blood, undermining King's claim that both he and Brewer were dropped off earlier.

The State also put on a note King had tried to smuggle to Brewer while both men sat in jail. A portion of the note reads as follows:

> As for the clothes they took from the apt. I do know that one pair of shoes they took were Shawn's dress boots with blood on them, as well as pants with blood on them. As far as the clothes I had on, I don't think any blood was on my pants or sweat shirt, but I think my sandals may have had some dark brown substance on the bottom of them.
>
> . . .
>
> Seriously, though, Bro, regardless of the outcome of this, we have made history and shall die proudly remembered if need be. … Much Aryan love, respect, and honor, my brother in arms. … Possum.

The State also introduced a wall scratching from King's cell: "Shawn Berry is a snitch ass traitor." King was aware at the time that Shawn Berry had spoken to police about the circumstances of Byrd's murder.

> King's trial counsel[]. . . gave no opening statement, cross-examined most State witnesses, and called three witnesses. The defense attacked the State's case in a few ways. The State needed to show that the murder occurred in the course of a kidnapping to prove the capital-murder charge, *see* Tex. Penal Code Ann. § 19.03(a)(2), so the defense attacked the kidnapping theory to save King from the death penalty.[] The defense also attacked the State's racial-motive theory by challenging the admission of evidence of King's racial animus and calling witnesses to testify that his racism was a method of self-preservation in prison. The defense put on evidence that King behaved normally following the murder. And the defense attacked the State's physical evidence[.]

(Pet. App. A at 6-7) (footnote omitted). These arguments did not convince the Jasper County, Texas, jury and King was convicted of capital murder on February 23, 1999. (ROA.6401).

C. King's capital sentence

1. The State's case at punishment

In addition to the horrific facts surrounding Mr. Byrd's kidnapping and murder and evidence of King's racist views, the State presented evidence of King's criminal history and refusal to conform his conduct to the rules imposed on him by the criminal justice system.

On May 31, 1992, seventeen-year-old King was arrested for burglarizing a welding and machine shop in Jasper, Texas, and stealing a shotgun, several knives, tools, and other items. (ROA.9289-9292). King pled guilty on June 2, 1990, to the second-degree felony offense of burglary of a building and was placed on ten years' deferred adjudication probation. (ROA.9292, 9851-9855).

Less than four months later, on September 15, 1992, King was arrested for a second burglary. (ROA.9293-9295, 9858). King had driven two cohorts (one of them Shawn Berry) to burglarize a store and was arrested as he sat outside in the parked car waiting for his accomplices to return. (ROA.9294-9295). On October 7, 1992, King plead guilty to the second degree felony offense of burglary of a building and received a ten-year sentence. (ROA.9300-9301, 9858-9862). The State moved to revoke his existing probation, but a plea agreement was made for King to be sent to boot camp. (ROA.9302). King spent seventy-five days at boot camp, then was returned to Jasper on January 14, 1993, and placed on ten years' probation for the second burglary. (ROA.9302).

King was arrested on May 3, 1993, for disorderly conduct for "hot rodding around the school." (ROA.9302-9303). His probation could have been revoked, but he was fined and reprimanded by his probation officer. (ROA.9303).

Nearly a year later, King was arrested for assault by threat against his sister. (ROA.9303). King's probation was not revoked, but he was sanctioned and placed at the Jefferson County Restitution Center on March 22, 1994. (ROA.9304, 9316). The jury learned that from the very beginning King had an extremely negative attitude, refused to perform community service or chores, and committed numerous violations of the center's rules. (ROA.9316-9317, 9319-9322). King's probation officer reprimanded King and warned him about

the consequences of his actions. (ROA.9318-9319). Two days later, on April 8, 1994, King absconded from the facility. (ROA.9316-9317).

On May 25, 1994, King was sent to the Liberty County Corrections Center and given 800 hours of community service. (ROA.9304-9306). King was negatively terminated from the center and sent to the Jefferson County Boot Camp for six months. (ROA.9327). After completing boot camp, King was returned to the Jefferson County Restitution Center on April 24, 1995. (ROA.9323). During his brief time there, he failed to follow staff orders, perform community service, and take his required medication, and King also once left for work but did not return for two days. (ROA. 9324-9327). King's probation was revoked and he was sentenced to eight years in prison. (ROA.9306-9307). He was released after serving two years. (ROA.9307).

During the search of King's apartment in connection with Mr. Byrd's murder, police discovered "some packaged meat," the same kind that was stolen from Patrick's Steak House a few days before. (ROA.9307, 9339).

Royce Smithey, the Chief Investigator for the Special Prison Prosecution Unit, testified that his unit investigates felony offenses occurring inside the Texas prison system and that he has observed the day-to-day functions of different prison units. (ROA.9348-9352). Mr. Smithey described the differences between conditions in the general prison population and on death row regarding how inmates are admitted, classified, housed, and transported.

(ROA.9349, 9351-9356). According to Mr. Smithy, if King received a life sentence, the prison would place some restrictions on him because of the violent nature of his offense; however, once he was classified, there were a vast number of units where King could be housed. (ROA.9354-9355). Mr. Smithey testified the prisons employ African-American medical personnel and guards, and that an inmate with a life sentence has more contact with guards, nurses, and other inmates compared to someone on death row. (ROA.9354-9356).

Mr. Smithey also testified generally about inmate violence within the prison system ranging from murder to simple assault, and reported that guards have found all types of weapons including bombs, zip guns, homemade knives or shanks, and firearms. (ROA.9357-9358). Mr. Smithey further testified that the prison system is not immune to gang activity and if someone like King wanted to join a gang for protection, "[h]is choice would probably be the Aryan Brotherhood of Texas. That's probably the most organized white disruptive group that there is in the prison system." (ROA.9361-9362). In Mr. Smithey's opinion, the Texas prison system "is probably the best prison system in the United States to handle violence simply because they certainly had a lot of experience at it; but no matter how good you get at, there's no way that you can totally control that inmate [twenty-four] hours a day. If [an inmate] wants to hurt somebody, he can hurt somebody." (ROA.9358, 9360-9361).

Psychiatrist Edward Gripon testified for the State regarding his work involving white supremacists and prison gangs. (ROA.9391-9392). Dr. Gripon stated that tattoos can provide a window into certain aspects of an individual, including what kind of image or statement the person is trying to promote or present. (*See* ROA.9393). According to Dr. Gripon, King had tattoos covering "a substantial portion of his body, 60, 65 percent." (ROA.9393). He described King's tattoos as "demonstrative" and "confrontive," and believed that King wanted to "make a statement, to make himself someone to either be feared or not to be messed with, that sort of thing." (ROA.9393-9394). Additionally, Dr. Gripon testified that he reviewed a number of King's letters. (ROA.9394). Dr. Gripon did not think King wrote the letters with the idea they would be read by anyone other than the intended recipient, and he believed the letters provided "a way to see and understand something about how that person thinks, what statements they make." (ROA.9395-9396). Some of the letters reviewed included King trying to organize a white supremacist group once he was released from prison. (ROA.9398-9399).

Dr. Gripon opined that King would pose a continued threat for future acts of violence based on his review of the FBI's reports detailing "interviews [with] quite a number of inmates, friends, and acquaintances" of King, King's letters and tattoos, King's past history, and "the sheer magnitude of [the] offense[] [as it was] so extreme and so dramatic that it remove[d] all doubt as

to what [he] was capable of." (ROA.9394, 9396-9399). He believed that King would be a future danger in or out of prison because his racist views were "not going to just dramatically go away," that King "would be potentially dangerous in any number of settings," and that King would likely continue his attempts to persuade others to his beliefs. (ROA.9399-9400).

Finally, the jury heard about King's attitude and behavior while in jail during the trial. Jasper County Sheriff's Investigator Joe Sterling described an exchange he had with King when King refused to come to the courthouse: "I just advised Mr. King that it was nothing personal from the officers, but if the judge required him and put out an order for him to be at the Courthouse that he would have to be at the Courthouse. … He then looked at me and told me that it was nothing personal, but assault on a peace officer was not shit because it did not - - he did not have anything to lose." (ROA.9386). Jasper County Jailer Kenneth Primrose described a night when, having heard a "ruckus" coming from the direction of King's cell and gone to investigate, King "said, if you think that's a loud noise, that's nothing and reached and picked up his TV and [threw] it against the stool." (ROA.9408). During a subsequent search of King's cell, a hangman's noose and a shank were found. (ROA.9412-9413).

2. The defense's case at punishment

Through defense counsel's cross-examination of the State's witnesses, the jury learned that none of the violations committed by King during his

second stay in the restitution center were violent (ROA.9329), that there was no violence connected with the break in at Patrick's Steak House (ROA.9335), and that King would have to serve "a minimum of [forty] years" before he was even eligible for parole (ROA.9383). On cross-examination, King's attorneys also elicited testimony that King generally caused no other problems while in jail awaiting or during trial, aside from the incident with the television and the verbal threat (ROA.9388); that on the day King destroyed the television, he had gotten a letter from his girlfriend indicating that she was living with another man and was pregnant by him (ROA.9414-9415); and after a hangman's noose and shank were found in King's cell, he was placed on suicide watch (ROA.9414-9415). On defense counsel's cross examination of Dr. Gripon, the State's expert admitted there is really no way to predict future dangerousness and that the American Psychiatric Society's (APA) position "is that psychiatrists are no better than any other individual with equal intelligence [and] the same information, that we have no special talent where that's concerned." (ROA.9400). He also reiterated that the best way to form an opinion regarding future dangerousness is through an actual interview, which did not occur in this case. (*See* ROA.9401-9402).

The defense's case-in-chief began with the testimony of clinical psychologist Dr. Walter Quijano. He explained that his assessment of King's future dangerousness was based his examination of King, his review of medical

records, jail records and TDCJ records, and his having spoken with King's father and King's lawyers. (ROA.9426-9427).

Dr. Quijano then testified regarding the statistical, environmental, and clinical factors for assessing future dangerousness that he derived from research and clinical experience. (ROA.9428). Regarding statistical factors, Dr. Quijano testified that the first factor is a history of past crimes involving violence. (ROA.9428). He found this factor in King's favor because there was "very little evidence of true assaultive behavior. There was some incident with a sister; but other than that, there is no pattern chronic history of assaultive behavior." (ROA.9428-9429). Age was another factor in King's favor: he would be sixty-four years old before being eligible for parole and "the probability of [sixty-four]-year-old people committing acts of violence is very low." (ROA.9429). Dr. Quijano acknowledged that King's gender was a factor against him because "men are more violent" than women. (ROA.9430). King's socio-economic status and employment were positive factors because he had "a reasonably stable job situation, and in prison there is no need for employment." (ROA.9431). Dr. Quijano testified that substance abuse is a factor in assessing dangerousness, and King had no substance abuse problem. (ROA.9431).

Regarding environmental factors, Dr. Quijano testified that such factors include family environment, peers, employment, and availability of victims. (ROA.9431-9434). Dr. Quijano acknowledged that King associated "with people

who advocate violence, who do violence, and who cheer people on when they do violence." (ROA.9431-9432). He also reported that the pool of King's potential victims was both random and narrow, but the prison system "will take the necessary steps to isolate him from his victim pool[.]" (ROA.9433).

Regarding clinical factors, Dr. Quijano testified that there was "no issue of mental illness" and "no evidence that [King met] the criteria of antisocial personality disorder, although he has features of it." (ROA.9435-9436). Also necessary for a determination of future dangerousness were the "specificity of the offense," the "deliberateness," and the defendant's remorse,[5] "post[-]conduct charge continuing crimes," and whether he had "fun after" committing the offense.[6] It was also explained that the "personal factors" surrounding the offense must be considered. (ROA.9436-9438).

Dr. Quijano testified further that his prediction of future dangerousness would be affected by King's "prolonged incarceration" and that what the prison system does to create a safe environment both for the inmates and its employees must be considered. (ROA.9438-9439; *see also* ROA.9440-9451). In the instant case, Dr. Quijano opined that King would never be placed in general

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[5] On cross-examination, Dr. Quijano admitted that King had "expressed absolutely and completely no remorse for his actions." (ROA.9461).

[6] Dr. Quijano also admitted he knew King a good time "playing volleyball and having a barbecue" within a day or two of the capital crime. (ROA.9462).

population, "[n]ot with his racist ideas, with the tattoos that would invite attacks from other groups, not because of the nature of the crime." (ROA.9541). Ultimately, Dr. Quijano explained that King would *not* constitute a future danger *if* imprisoned. (ROA.9452). He also told the jury that King's life history did not indicate he would become the racist that drove him to kidnap and viciously attack Mr. Byrd until King went to prison and was assaulted on his first day there, and that those events "traumatized him and changed him dramatically." (ROA.9452-9453).

The last witness to testify was King's father, Ronald King.[7] He told the jury that he had adopted King when he was three months old. (ROA.9472, 9473). King's mother died just two days before his sixteenth birthday, and it was the next year that King started getting trouble. (ROA. 9474, 9475). Before King went to prison, he was not a racist. (ROA.9475). Finally, he implored the jury to sentence his son to life rather than death. (ROA.9478-9479).

At the conclusion of evidence and argument, the jury answered affirmatively the special sentencing issues on future dangerousness and the so-called "anti-parties" charge, and answered negatively the special issue on mitigation. (ROA.6444). On February 25, 1999, the trial court sentenced King to death by lethal injection. (ROA.6446-6449).

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[7] King refused to be present for his father's testimony. (ROA.9469-9471).

D. Direct appeal and postconviction proceedings

The Texas Court of Criminal Appeals (TCCA) affirmed King's conviction and death sentence, rejecting eight points of error on direct appeal. *King v. State*, 29 S.W.3d 556 (Tex. Crim. App. 2000).

King, through court-appointed counsel, filed a state habeas application on July 5, 2000, alleging the trial court deprived him of his right to effective assistance by denying his request for the appointment of new trial counsel, and raising four IATC claims based on trial counsel's failure to (1) raise an insanity defense, (2) investigate matters supporting mitigation, (3) investigate and present an alibi defense, and (4) make a full record. (ROA.9901-9927). Lead defense trial counsel Haden Cribbs, Jr., provided an affidavit addressing the allegations. (ROA.10035-10040). The TCCA adopted the trial court's findings and conclusions (ROA.10066-10089) with two exceptions not relevant here, and denied habeas corpus relief. *Ex parte King*, No. WR-49,391-01 (Tex. Crim. App. June 20, 2001) (unpublished order) (ROA.11675-11676).

In 2002, King, now represented by his current attorney A. Richard Ellis, filed a federal habeas petition raising twenty-one grounds for relief. (ROA.241-1724), including the IATC claims currently raised to this Court. (ROA. 374-409, 589-600). The Director moved for summary judgment, arguing that many of King's claims were unexhausted. (ROA.2735-3084). King replied (ROA.3093-585), and moved to stay and abate to file a second state habeas application.

(ROA.3586-3606). The district court granted summary judgment for the Director with respect to the grounds that had been exhausted in state court, but also granted King's motion and stayed proceedings while he returned to state court to exhaust claims. (*See generally* Dir. App. A).

King filed a successive state habeas application on June 22, 2006. (ROA.11260-11622). The TCCA dismissed the application "as an abuse of the writ without considering the merits of the claims." *Ex parte King*, No. WR-49,391-02, 2012 WL 3996836 (Tex. Crim. App. Sept. 12, 2012) (unpublished) (citing Tex. Code Crim. Proc. art. 11.071, § 5(c)) (ROA.11679-11680).

Returning to federal court, King filed a nearly six hundred page amended habeas petition that incorporated and expanded on the claims originally raised. (ROA.4161-4991). On June 23, 2016, the district court denied habeas corpus relief on all claims, dismissed the case with prejudice, and declined to certify any issue for appeal. (*See generally* Pet. App. C). Final judgment issued the same day by separate order. (ROA.5913).

In 2017, the Fifth Circuit Court of Appeals granted King a COA on an IATC claim challenging counsel's presentation of a case for actual innocence and denied COA on the remaining claims, including the three IATC claims raised here. (Pet. App. B). In 2018, the Fifth Circuit affirmed the denial of habeas corpus relief on the actual-innocence IATC claim and later denied rehearing. (Pet. App. A).

SUMMARY OF THE ARGUMENT

King has not furnished a single reason to grant certiorari review in this case, let alone a compelling one. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari will be granted only for compelling reasons."). No conflict has been supplied, no important issue proposed, nor has a similar pending case been identified to justify this Court's discretionary review. Instead, he argues the Fifth Circuit engaged in full-scale adjudication of the merits to justify denying him a COA, contravening this Court's decisions in *Miller-El v. Cockrell*, 537 U.S. 322 (2003), and *Buck v. Davis*, 137 S. Ct. 759 (2017). He is mistaken.

The passages that King cites from the Fifth Circuit's decision as being part of a "premature merits determination" are contained in the Fifth Circuit's standard of review section. (Pet. 29, #1; Pet. 33, #1; Pet. 38, #1). King also cites to instances where the Fifth Circuit is summarizing the district court's conclusions but erroneously contends the statements originated from the Fifth Circuit as part of an "explicit merits determination" or else that the Fifth Circuit itself made that holding. (E.g., Pet. 29, #2; Pet. 30-31; Pet. 38, #2; Pet. 38-39, #3). King cannot create controversy where none should exist. Considered in the proper context and in its entirety, the unanimous, unpublished decision from the Fifth Circuit evidences a proper and straightforward application of the COA standard that is consistent with AEDPA and this Court's established precedent. (*See generally* Pet. App. B).

Because King cannot avail himself of *Buck* and *Miller-El* to demonstrate a certworthy issue, the Court has no compelling reasons to grant review to consider the IATC claims for which King seeks a COA. (Pet. 22-40). His petition to this Court is nothing more than a request for error correction and this Court's limited resources would be better spent elsewhere. *See* Sup. Ct. R. 10 ("A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). Because King cannot show that reasonable jurists could debate the district court's disposition of his IATC claims on procedural or merits-based grounds, certiorari review should be denied.

ARGUMENT

I. The Fifth Circuit's Review of King's COA Application Fully Comports with AEDPA and this Court's Established Precedent.

King argues the Fifth Circuit engaged in an erroneous COA analysis. (*See* Pet. ii, 12-21). He contends the court of appeals "ignored" this Court's holdings in *Miller-El* and *Buck* by not limiting its COA inquiry to the threshold question of whether his IATC claims were debatable among jurists of reason. (Pet. 12). King asserts that the Court should grant review to once again reinforce the correct application of the COA standard. (Pet. 14-21). To the contrary, the Fifth Circuit's COA inquiry in this case is consistent with AEDPA and this Court's established precedent. (*See generally* Pet. App. B).

On federal habeas review, the district court held that the guilt-phase portion of King's psychiatric-evidence IATC claim was rejected on the merits in the court's prior order granting summary judgment (Dir. App. A at 18-19), and that King failed to show that the state court adjudication warranted relief under 28 U.S.C. § 2254(d). (Pet. App. C at 33-35). The court held that King's IATC claims regarding future dangerousness, the motion for change of venue, and psychiatric evidence at punishment were defaulted, citing binding Fifth Circuit precedent holding that the TCCA's dismissal as an abuse of the writ has regularly been upheld as a valid state procedural bar foreclosing federal habeas review. (Pet. App. C at 7) (citing, e.g., *Hughes v. Quarterman*, 530 F.3d 336, 342 (5th Cir. 2004)). The court went on to conclude that King's default could not be excused under *Martinez* and *Trevino* because he failed to show that initial state habeas counsel was ineffective for not raising the IATC claims and that the claims were "substantial." (*See* Pet. App. C at 7-12, 33-36).

To obtain appellate review of his IATC claims, King needed to first obtain a COA. *See Buck*, 137 S. Ct. at 773. The Fifth Circuit could only issue a COA if King "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To obtain review of his IATC claim that was denied on substantive grounds, King needed to show "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). For a COA

to issue for his procedurally defaulted IATC claims, King had to also show "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id*. As this Court held in *Buck*, the COA inquiry "is not coextensive with a merits analysis" and should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Buck*, 137 S. Ct. at 773 (quoting *Miller-El*, 537 U.S. at 336).

In this case, the Fifth Circuit set out the legal framework for King's claims—the *Strickland* ineffective assistance of counsel standard and the *Martinez/Trevino* exception to procedural default—before beginning its assessment of the claims in light of the COA inquiry. (Pet. App. B at 6-7).[8] The court of appeals cited the correct standards for issuing a COA. (Pet. App. B at 5-6) (citing § 2253(c)(2), *Buck*, 137 S. Ct. at 773, and *Miller-El*, 537 U.S. at 327, 336), then applied those standards in a manner that is consistent with this Court's precedent. (Pet. App. B at 8-12). The Fifth Circuit denied COA on the guilt-phase aspect of King's claim that counsel was ineffective for failing to present psychiatric evidence (part of King's Claim III to this Court) after finding that jurists of reason could not debate the district court's denial of the claim under § 2254(d). (Pet. App. B at 11-12). For King's defaulted IATC

[8] King erroneously cites to the Fifth Circuit's standard of review section as being an improper adjudication on the merits. (E.g., Pet. 29, #1; Pet. 33, #1; Pet. 38, #1) (citing Pet. App. B at 7).

claims, the Fifth Circuit held they did not meet the COA inquiry because jurists of reason would not debate the district court's finding that the claims are not "substantial" under second prong of the *Martinez*/*Trevino* exception. (Pet. App. B at 8-10, 12).[9] While King is dissatisfied with the denial of a COA, his dissatisfaction is no basis for the Court to grant review.

At its crux, King's argument appears to be that *any* discussion of the merits by the Fifth Circuit necessarily violates *Miller-El* and *Buck*. (*See* Pet. 28-30, 32-35, 38-40). Such a contention is legally unsound. In the first place, for the Fifth Circuit to decide whether jurists of reason would find it debatable whether the district court was correct in its procedural ruling—that several of King's IATC claims were defaulted because King failed to show they were "substantial"—the court of appeals necessarily had to make a threshold determination of whether the claims have "some merit." *See Martinez*, 566 U.S. at 14 ("To overcome the default, a prisoner must also demonstrate that the underlying [IATC] claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit."). If all discussion of the merits is taboo, then the Fifth Circuit could never reach the procedural default ruling, and that is certainly not the law. Furthermore, the COA standard

[9] The Fifth Circuit did not decide whether jurists of reason could debate whether state habeas counsel was ineffective and instead "assume[d] arguendo that the first prong of the *Martinez*/*Trevino* exception is met." (Pet. App. B at 8, n. 9).

requires threshold merits consideration before a COA may be granted. *Miller-El*, 537 U.S. at 336 (COA determination "requires an overview of the claims in the habeas petition and a general assessment of their merits" and not "full consideration of the factual and legal bases adduced in support of the claims."). In this case, the Fifth Circuit's decision was hardly a full-scale review of the merits, especially in a field as complicated as death-penalty habeas corpus.

King's reliance on *Miller-El* and *Buck* to show error in his case is of no avail because the Fifth Circuit's decision is consistent with AEDPA and this Court's precedent. The Court should therefore deny King's petition because the questions presented are not certworthy.

II. In Any Event, King is Not Entitled to a COA for Any of His Claims of Ineffective Assistance.

King argues that under a properly conducted threshold inquiry, he is "at least" entitled to a COA on his three claims of ineffective assistance of counsel. (Pet. 22, 23-40). No COA is warranted because reasonable jurists would not disagree with the district court's disposition of the claims on procedural and merits-based grounds.

A. No reasonable jurist could debate the district court's determination that King's IATC claim regarding future dangerousness is procedurally defaulted and lacks any merit (King's Claim I).

King argues that he was denied constitutionally effective assistance at the punishment phase of trial because his attorneys failed to effectively

counter testimony from the State's expert, Dr. Edward Gripon, and presented a harmful witness, Dr. Walter Quijano, who agreed with Dr. Gripon that King would be a danger in the future. (Pet. 23). In his amended federal habeas petition, King alleged trial counsel allowed both the State's expert and the defense expert to present "a false, misleading, and incoherent expert's framework for" future dangerousness. (ROA.4368-4388). The district court concluded in part that King's IATC claim lacked any merit, that the claim was not substantial under *Martinez* and *Trevino*, and that claim is therefore procedurally defaulted. (Pet. App. C at 11). Reasonable jurists would debate neither the determination as to the procedural bar nor as to the merits.

1. This claim is procedurally barred.

King's IATC claim was dismissed by the TCCA as an abuse of the writ without considering the merits when it was raised in a successive state habeas application. (ROA.11679-11680). The district court held that King's IATC claim was defaulted because the TCCA's dismissal is a valid state procedural bar that forecloses federal habeas review. (Pet. App. C at 7) (citing *Hughes*, 530 F.3d at 342). King argued in the lower courts and here that his procedural default should be excused under *Martinez* and *Trevino* because state habeas counsel was ineffective for not raising a substantial IATC claim.

The *Martinez* exception protects a petitioner from forfeiting completely a claim of ineffective assistance of trial counsel if the petitioner's state habeas

counsel failed to raise the claim in state court and was ineffective for doing so. 566 U.S. at 16. This Court was concerned that the "failure [of a federal court] to consider a lawyer's 'ineffectiveness' during an initial-review collateral proceeding as a potential 'cause' for excusing a procedural default will deprive the defendant of any opportunity *at all* for review of an ineffective-assistance-of-trial-counsel claim." *Trevino*, 569 U.S. at 428 (emphasis added); *see also Martinez*, 566 U.S. at 16 ("When an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner's claim. … And if counsel's errors in an initial-review collateral proceeding do not establish cause to excuse the procedural default in a federal habeas proceeding, no court will review the prisoner's claims.") (internal citations omitted). But the *Martinez* exception was created to address that concern and that concern *only*. 566 U.S. at 16 ("The rule of *Coleman* [*v. Thompson*, 501 U.S. 722 (1991),] governs in all but the limited circumstances recognized here.").

Even if King could establish that state habeas counsel was deficient, he must still show that his underlying claim of ineffective assistance is "substantial." *Martinez*, 566 U.S. at 14. And even then, establishing that state habeas counsel was ineffective "does not entitle the prisoner to habeas relief. It merely allows the federal court to consider the merits of the claim that otherwise would have been procedurally defaulted." *Id.* at 13. The lower court

did exactly that, and reasonable jurists would not debate its conclusion that this claim is without merit.

2. King was not denied effective assistance.

The Sixth Amendment, together with the Due Process Clause, guarantee a defendant both the right to a fair trial and the right to effective assistance of counsel at that trial. *Strickland*, 466 U.S. at 684-86. A defendant's claim that he was denied constitutionally effective assistance requires him to affirmatively prove both that (1) counsel rendered deficient performance, and (2) his actions resulted in actual prejudice. *Id*. at 687-88, 690. Importantly, failure to prove either deficient performance or resultant prejudice will defeat an IATC claim, making it unnecessary to examine the other prong. *Id*. at 687.

In order to demonstrate deficient performance, King needed to show that, in light of the circumstances as they appeared at the time of the conduct, "counsel's representation fell below an objective standard of reasonableness," i.e., "prevailing professional norms." *Id*. at 689–90; *see also Harrington v. Richter*, 562 U.S. 86, 105 (2011). This Court has admonished that judicial scrutiny of counsel's performance "must be highly deferential," with every effort made to avoid "the distorting effect of hindsight." *Strickland*, 466 U.S. 689-90; *see also Richter*, 562 U.S. at 105 ("It is 'all too tempting' to 'second-guess counsel's assistance after conviction or adverse sentence.'") (citations omitted); *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) ("The Sixth Amendment

guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.") (citations omitted). Accordingly, there is a "strong presumption" that the alleged deficiency "falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

Even if deficient performance can be established, King nevertheless needed to affirmatively prove prejudice that is "so serious as to deprive [him] of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. This requires him to show a reasonable probability that but for counsel's deficiencies, the result of the proceeding would have been different." *Id*. at 694. A "reasonable probability" is one sufficient to undermine confidence in the outcome. *Id*. The issue "is *not* whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel [had] acted differently." *Richter*, 562 U.S. at 111 (emphasis added and citations omitted). Rather, "[t]he likelihood of a different result must be substantial, not just conceivable." *Id*. at 112 (citation omitted).

In courts below and here, King relies on clinical psychologist Mark Cunningham to second-guess the methodologies of Drs. Gripon and Quijano. (Pet. 26-27). He faulted counsel for failing to rebut Dr. Gripon's testimony and, presumably, for failing to replace Dr. Quijano's allegedly flawed analysis with the "approach" set forth in Dr. Cunningham's affidavit. (ROA.4368-4388). In

broad strokes, King has claimed that trial counsel failed to put future dangerousness into the appropriate context, failed to sufficiently discuss the effects of aging, and failed to inform the jury of measures within the prison system intended to prevent violent conduct. (ROA.4377-4386). Contrary to these assertions, reasonable jurists would not disagree with the district court's conclusion that trial counsel presented a sound and viable case regarding future dangerousness. (Pet. App. C at 10-11).

King takes issue with the district court's conclusion that counsel effectively cross-examined Dr. Gripon because it "was less than three pages of trial transcript, or less than three minutes." (Pet. 24). But in that time, counsel attempted to discredit Dr. Gripon based on his failure to conduct a face-to-face interview with King,[10] his inability to predict future violence with 100 percent certainty, and the fact that he, as a psychiatrist, is no better suited than anyone else to predict future behavior. (ROA.9400-9402).

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[10] During the State's direct-examination, Dr. Gripon agreed that the "best way . . . to form a conclusion about somebody is to talk directly to the individual." (ROA.9396). While Dr. Gripon did not interview King, he did have access to letters King had written "predominately to acquaintances, either people in the penitentiary setting, girlfriends outside." (ROA.9395). Because they were not meant "to be reviewed by anyone in any kind of process such as this," Dr. Gripon told the jury that the letters gave him, "through collateral information[,] a way to see and understand something about how [King] thinks, what statements [he] make[s]" because "there's an expression of feeling and opinion in a lot of that." (ROA.9395-9396). It is also important to note that Dr. Gripon could *not* interview King regarding sanity or future dangerousness without counsel present. (*See*, *e.g.*, ROA.6299, 10077).

Further, the district court reasonably concluded that counsel effectively rebutted Dr. Gripon's testimony with the testimony of Dr. Quijano, who testified that King's potential for future violence must be assessed in the appropriate context, that is, prison. (Pet. App. C at 10). Dr. Quijano, himself the former chief psychologist for TDCJ, testified extensively about the measures at TDCJ's disposal for insuring that inmates—even those who would pose a threat in free society—do not pose a threat in prison.[11] (ROA.9438-9453). He also explained that given King's prison history, his tattoos and the facts of the crime, he would likely be assigned to administrative segregation for the duration of his imprisonment. (ROA.9440-9441). Finally, Dr. Quijano testified specifically about the effects of aging on the likelihood of future dangerousness, and that fact that if sentenced to life, King would not be eligible for parole until the age sixty-four when the probability of future dangerousness would be very low. (ROA.9429). Therefore, trial counsel did not "avoid[] the issue [of future dangerousness] altogether," as King argued to the district court. (ROA.4387).[12] As that court reasonably concluded, counsel's handling of

[11] Royce Smithey also testified to this information. (ROA.9351-9363).

[12] The fact that Dr. Quijano's testimony was countered in part on cross-examination does not impact counsel's effectiveness in the presentation of his testimony on direct examination. Further, on redirect, Dr. Quijano testified again "the probability [for future dangerousness] is very low, given what prison can do to this person." (ROA.9467).

the future dangerousness special issue fell within the bounds of reasonable performance. *See Coble v. Quarterman*, 496 F.3d 430, 437 (5th Cir. 2007).

Finally, given the horrific nature of Mr. Byrd's murder, King's criminal history and his white supremacist leanings, King failed to show that but for counsel's allegedly unprofessional errors, that "[t]he likelihood of a different result" at the punishment phase "[is] substantial, not just conceivable." *Richter*, 131 S. Ct. at 792 (citation omitted). Because reasonable jurists would not debate the district court's conclusion that King failed to establish cause and prejudice so as to overcome the procedural bar, COA must be denied.

B. No reasonable jurist could debate the district court's decision that King's IATC claim regarding counsel's not obtaining a change of venue is defaulted and without merit (King's Claim II).

King argues that he is entitled to a COA on his claim that trial counsel presented the motion for change of venue inadequately. (Pet. 30-35). The district court rejected the claim after finding it procedurally defaulted and lacking any merit because King's trial counsel's performance was not deficient and King failed to show prejudice. (Pet. App. C at 11-12). The only question the Court should have is why King raises a defaulted claim that the district court found "misrepresents the record" (Pet. App. C at 12), and the Fifth Circuit concluded is "not an accurate characterization." (Pet. App. B at 10).

1. This claim is procedurally barred.

As with King's preceding IATC claim regarding future dangerousness, this claim too was dismissed by the TCCA as an abuse of the writ under Article 11.071, Section 5 of the Texas Code of Criminal Procedure. **(**ROA.11679–11680). Again, the district court concluded that this valid state procedural bar foreclosed federal habeas relief. (Pet. App. C at 7) (citing *Hughes*, *supra*). King argued as he does here that he could overcome the default because state habeas counsel was ineffective. (See Pet. 30-32). Yet even if King could establish that initial state habeas counsel was deficient, he needed to show that his underlying IATC claim is "substantial." *Martinez*, 566 U.S. at 14. Even then, establishing state habeas counsel was ineffective "merely allows the federal court to consider the merits of the claim that otherwise would have been procedurally defaulted" *Id*. at 1320. The district court did that, and reasonable jurists would not debate its conclusion that this claim lacks any merit.

2. King was not denied effective assistance.

King argues that counsel's presentation at the hearing on the motion for change of venue was a "perfunctory affair where only two witnesses testified very briefly, and merely stated that they did not think that King could receive a fair trial in Jasper." (Pet. 31). He asserts that if counsel had offered testimony "from [unnamed] witnesses regarding the glare of publicity that had engulfed Jasper, the town's need to secure a guilty verdict in order to avoid the 'racist'

label, and the need to avoid racial strife in Jasper," then there is a likely possibility the motion would have been granted. (Pet. 31-32).

The district court initially rejected the claim for King's failure to show that counsel's representation fell below an objective standard of reasonableness. (Pet. App. C at 12). From the outset, the court found that King's "description of counsel's efforts as a 'perfunctory affair' misrepresents the record." (Pet. App. C at 11-12). The record instead shows King's attorneys filed a motion for change of venue supported by affidavits from two witnesses attesting King could not get a fair trial due to "widespread, inflammatory and prejudicial publicity[.]" (ROA.6245-6251). King obtained a hearing on the motion during which two witnesses testified on his behalf, including the trial attorney originally appointed for King, and five witnesses testified for the State. (ROA.6684-6755). Three additional witness were expected to testify for King, but they did not appear. (ROA.6713). Counsel submitted a joint exhibit containing copies of all the local and statewide newspaper articles (with only one exception) pertaining to the James Byrd, Jr. murder case. (ROA.6691-6692). The fact that the trial court denied King's motion (ROA.6284), and denied it again when it was re-urged at the start of trial (ROA.8167-8168), does not establish an IATC claim.[13]

[13] King argues the district court failed to consider his argument that the defense "had an entirely misguided and doomed fixation on a trivial rise in Jasper

Additionally, the district court reasonably concluded that King failed to satisfy *Strickland*'s prejudice prong. (Pet. App. C at 12). King complained that additional witnesses should have been called, but did not identify any witnesses or evidence available at the time of the hearing that trial counsel was remiss for not presenting. King cannot show prejudice when the complained-of, omitted evidence is not before the court. At best, King argued that his co-defendant Lawrence Russell Brewer obtained a change of venue; however, the district court held that Brewer was ultimately found guilty and sentenced to death, so the change of venue did not make any difference. (Pet. App. C at 12). King thus failed to establish that had his defense counsel secured a change of venue, his trial would have ended differently. *See Richter*, 562 U.S. at 112. Because King failed to satisfy either *Strickland* prong, the district court reasonably concluded that he failed to present an IATC claim with at least some merit. (Pet. App. C at 12). Accordingly, reasonable jurists would not debate the lower court's conclusion that King failed to establish cause and prejudice so as to overcome the procedural bar, so COA must be denied.

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property taxes as their main rationale for a change of venue, which only affected each taxpayer to the extent of about five dollars." (Pet. 31). The Fifth Circuit rejected King's argument as "simply not an accurate characterization" noting that "[f]ar from being the focus of King's trial counsel, the tax theory made only a brief appearance in his trial counsel's questioning." (Pet. App. B at 10). Out of seven witnesses that testified at the hearing, counsel asked only a few questions on direct examination of one witness (ROA.6695-6696), on cross-examination of one witness (ROA.6728), and further cross-examination of another witness (ROA.6751-6753).

C. No reasonable jurist could debate the district court's denial of habeas relief on procedural and merits-based grounds on King's IATC claim regarding psychiatric evidence (King's Claim III).

King's final IATC claim alleges that counsel was remiss in not presenting psychiatric evidence at both the guilt and punishment phases of trial. (Pet. 35-40). He maintains that "[g]iven the circumstances of the crime, [his] mental state was obviously a critical issue" and "the defense knew or should have known that an insanity or diminished capacity defense was a very viable option." (Pet. 35). King further asserts that trial counsel "made little or no attempt to have [him] evaluated on a confidential basis." (Pet. 35-36) (citing *Ake v. Oklahoma*, 470 U.S. 71 (1985)). Finally, he proposes that the affidavit of Dr. Richard Peck, his expert on federal habeas, "makes clear" that "mental health information was readily available that would have had mitigating value at the punishment phase" including that King had been diagnosed as manic depressive and bi-bolar, that King was taking anti-depressant medications, and that King self-reported several suicide attempts. (Pet. 36) (citing ROA.1345-1347). Reasonable jurists would not debate the district court's determination that this claim is both procedurally barred and without merit.

1. The guilt-phase portion of King's claim was denied on the merits under §2254(d).

King states that his entire IATC claim "was procedurally barred for failure to raise it in the initial state habeas application and because it was

dismissed as an abuse of the writ in the successor petition." (Pet. 35). He also complains that Fifth Circuit "explicitly denied this claim on the inapplicable [§] 2254(d) standard which is a "merits determination." (Pet. 38, #2). He is mistaken on both accounts. The district court granted summary judgment on King's claims that were exhausted in his initial state habeas application, including the instant claim. (Dir. App. A at 18-19; Pet. App. C at 6, 33-35). The court reasonably concluded that King failed to show under § 2254(d) that the state court adjudication—that trial counsel did not perform deficiently—resulted in a decision that was contrary to, or an unreasonable application of, clearly established federal law, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. (Pet. App. C at 35). There is no reason for the Court to grant review on this IATC claim where King fails to address it.

2. The punishment-phase portion of King's IATC claim is procedurally barred and without merit.

This claim was dismissed by the TCCA as an abuse of the writ. (ROA.11679–11680). Again, the district court concluded that a valid state procedural bar foreclosed federal habeas review. (Pet. App. C at 7) (citing *Hughes*, *supra*). King argues that his default should have been excused under *Martinez*/*Trevino*. (*See* Pet. 35-38). Even if King made this showing, it merely allows the federal court to consider the merits of the claim that is otherwise

defaulted. The district court did that, and reasonable jurists would not debate its conclusion that the claim lacks any merit.

King's argument appears to be that counsel was per se ineffective for using a psychologist, rather than a psychiatrist. However, Dr. Quijano testified that King had no mental disorder and this meant he posed *less* of a future danger. (ROA.9434-9435). Counsel was entitled to rely on Dr. Quijano's opinion and is not deficient for "not canvassing the field to find a more favorable expert." *Dowthitt v. Johnson*, 230 F.3d 733, 748 (5th Cir. 2000). King has not shown the need for any additional psychiatric expert on this matter; thus, the district court properly rejected this claim. (Pet. App. C at 33-36).

Additionally, in his affidavit submitted during state habeas proceedings addressing King's claim that counsel was ineffective in not presenting an insanity defense, lead defense trial counsel Hayden Cribbs, Jr., explained why mental health evidence was not presented at trial or punishment:

> During my preparation for trial I made diligent efforts to discover and develop any evidence of mental illness, insanity, or mental defects which might have excused Mr. King from criminal responsibility or mitigated punishment. I tried without success to obtain favorable psychiatric evidence. I talked to several personal friends who are psychiatrists or psychologists who do not wish to become involved in this case. I was able to obtain the services of Dr. Curtis Wills, a forensic psychologist from the Wilmington Institute, who has had vast experience in criminal defense and prosecution mental health evaluations, and has testified in both state and federal courts, to interview Mr. King and render an opinion regarding his mental condition. Dr. Wills could only advise me that Mr. King was intelligent, able to converse regarding his

> circumstances and showed no evidence of any insanity, mental illness or any mental disability. Mr. King also denied that he had any mental disability on which I could base a claim of insanity or mitigation. In preparing for trial we searched for and interviewed Mr. King's natural mother, sisters, natural father, step-father, step-sister and [talked] on numerous occasions with his adoptive father, Ronald King, and numerous friends. All but his adoptive father and some friends were essentially hostile to Mr. King; and all but the adoptive sister, his adoptive father and some friends refused to testify and refused to offer any testimony that might be helpful at all to him and none of the people I interviewed gave any indication that Mr. King had any insanity or mental illness. All of the family members I talked to indicated that Mr. King had been pampered and protected as [a] child, that he had not been abused, and that he had been protected from the negative consequences of his actions by his adoptive family. I checked his school records, reviewed available history pertaining to his adoptive parents and natural parents, and talked personally to Texas Department of Criminal Justice employees and fellow inmates who had associated with Mr. King; I did not uncover any evidence in any of these interviews that I believed, in my professional judgment, could be helpful to Mr. King's defense. I eventually obtained the services of Dr. Walter Quijano, a forensic psychologist with significant criminal experience, to testify on Mr. King's behalf. He and two associates did an extensive examination of Mr. King and also found no evidence of insanity, mental illness or mental disability. Dr. Quijano testified on Mr. King's behalf on punishment. After interviewing Dr. Wills, we felt that any evidence from Dr. Wills on punishment would not be helpful at all and he was not used.

(ROA.10036-11039).[14] This is not the case where counsel is on notice of a past institutionalizations or mental health history and conducted "no investigation of any kind." *Bouchillon v. Collins*, 907 F.2d 589, 596-97 (5th Cir. 1990).

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[14] *See* ROA.10077 ("The Court finds from all of the evidence produced at trial, from the Court's own observations and review of [King's] letters and *pro se* pleadings filed in this Court, and from the affidavit of Mr. Cribbs regarding his

Finally, King offers a June 2002 postconviction evaluation by Dr. Richard Peek (ROA.1345-1357) and records from Jefferson County Residential Services and TDCJ (ROA.1349-1373), to show he might have been depressed around the time of the capital murder and *might have been* suffering from bi-polar disorder (a purely speculative guess on the part of Dr. Peek). This evidence does not show that counsel's investigation (set out above) fell below an objective standard of reasonableness. Yet even if it is assumed that counsel is deficient in not discovering this evidence, King cannot show a reasonable likelihood of a different result at either stage of trial. *See Richter*, 562 U.S. at 112. King was not entitled to a COA on this claim because no reasonable jurist would debate the district court's procedural and merits based rulings.

CONCLUSION

The Court should deny King's petition for writ of certiorari.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

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additional investigation that [King] had no mental disorder that would render him incompetent to stand trial, that [King] is at least of normal intelligence, and that [King] has not demonstrated any mental illness or disability that would mitigate his moral blameworthiness for this offense."); ROA.10077 ("The Court finds that trial counsel was reasonably effective in refraining from attempting to raise an insanity defense at trial in light of the lack of evidence to support such a defense."); ROA.10078 ("The Court finds that trial counsel used defense testimony regarding [King's] lack of mental illness to his advantage at the punishment stage and that such use was a reasonable exercise of trial strategy.").

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