No. 18-7431

IN THE

# Supreme Court of the United States

TEDDRICK BATISTE,
*Petitioner*,

v.

LORIE DAVIS, DIRECTOR TDCJ-CID,
*Respondent*.

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

## PROOF OF SERVICE

I hereby certify that on the 15th day of March, 2019, a copy of **Respondent's Brief in Opposition to Petition for a Writ of Certiorari** was sent by mail and electronic mail to: Ken McGuire, P.O. Box 79535, Houston, Texas 77279, kennethmcguire@att.net. All parties required to be served have been served. I am a member of the Bar of this Court.

s/ Jefferson Clendenin
JEFFERSON CLENDENIN
Assistant Attorney General
Criminal Appeals Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 936–1400

*Counsel for Respondent*

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## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI


KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

ADRIENNE MCFARLAND
Deputy Attorney General
for Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

JEFFERSON CLENDENIN
Assistant Attorney General
Criminal Appeals Division
*Counsel of Record*

P.O. Box 12548, Capitol Station
Austin, Texas 78711–2548
(512) 936–1400
*jay.clendenin@oag.texas.gov*

*Counsel for Respondent*

## QUESTION PRESENTED

Petitioner Teddrick Batiste was convicted and sentenced to death for the murder of Horace Holiday—one of two capital murders Batiste committed over a two-week period. Batiste raised a claim in his state habeas application alleging that his trial counsel were ineffective for failing to investigate and present mitigating evidence that he suffered from frontal lobe damage. The state court denied the claim. Batiste then raised the claim in his federal habeas petition. The district court denied the claim after extensively discussing the state habeas court's findings and by relying on the same factual and legal bases as the state court. The Fifth Circuit denied Batiste's request for a certificate of appealability (COA) as to the district court's denial of the claim, holding that the district court's decision was not debatable.

Batiste argues that the district court's analysis did not comply with this Court's opinion in *Wilson v. Sellers*, 138 S. Ct. 1188 (2018), which he asserts requires a federal court to limit its deferential review of a state habeas court's denial of a petitioner's claim to the state court's findings. He also argues the Fifth Circuit improperly conducted a merits analysis rather than a threshold COA analysis. These facts raise the following question:

> Should the Court grant certiorari where the district court's analysis of Batiste's claim was consistent with the analysis this Court suggested in *Wilson* and where the Fifth Circuit made a proper threshold COA determination?

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## BRIEF IN OPPOSITION

Batiste raised a claim in his state habeas application alleging that his trial counsel were ineffective for failing to present evidence that he suffered frontal lobe damage, which caused him to act impulsively and without reflection. The state court rejected the claim finding that trial counsel were not deficient because counsel elicited similar testimony from a prosecution witness, counsel obtained the assistance of three mental health experts, the defense experts did not indicate Batiste suffered from frontal lobe damage, and Batiste's postconviction expert's opinion regarding the purported frontal lobe damage was unpersuasive. The state court concluded Batiste failed to show prejudice because the jury was aware of Batiste's impulsivity and the aggravating evidence of Batiste's extensive and violent criminal history was particularly strong.

Batiste then raised this claim in his federal habeas petition. The district court rejected the claim because Batiste failed to show deficiency in light of trial counsels' extensive mitigation investigation, which was aided by three mental health experts, and because trial counsel could not be deficient for failing to present unpersuasive evidence of frontal lobe damage. The district court also concluded Batiste's claim failed because he could not show prejudice in light of the extensive aggravating evidence of Batiste's criminal history. In

addressing Batiste's claim, the district court cited extensively to the state habeas court's findings.

Lastly, Batiste sought a COA in the Fifth Circuit regarding the district court's rejection of this claim. The Fifth Circuit denied a COA because the district court's conclusions were not debatable.

Batiste argues the district court erred in denying his claim because it did not scrutinize the state court's findings as required by *Wilson*, 138 S. Ct. at 1191–92. He argues that the district court applied Fifth Circuit precedent and instead looked only to whether the state court's ultimate conclusion was unreasonable. Batiste asserts that Fifth Circuit precedent prevented him from arguing the state court's specific findings were unreasonable. Batiste also argues that the Fifth Circuit erred in failing to grant a COA based on this Court's intervening opinion in *Wilson* and that the Fifth conducted a merits review of his ineffective-assistance-of-trial-counsel (IATC) claim rather than a threshold COA review. Pet. Cert. at 18–22.

Batiste does not present a compelling reason justifying certiorari review. First, the district court's analysis of his IATC claim focused almost exclusively on the state court's findings regarding the claim. Even assuming this Court's *Wilson* decision applies here, the district court conducted the analysis *Wilson* suggested. The district court did not, as Batiste suggests, only consider whether the state court's ultimate conclusion was unreasonable. Second,

Batiste raised in the lower courts the very arguments he now asserts he was precluded by circuit precedent from raising. Third, on four occasions Batiste briefed in the Fifth Circuit the purported impact of *Wilson* to his case. Fourth, the Fifth Circuit's denial of a COA was appropriately based on a threshold review of the district court's denial of Batiste's IATC claim. Lastly, Batiste's IATC claim is entirely without merit. Consequently, Batiste's petition should be denied.

## STATEMENT OF JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATEMENT OF THE CASE

### I. Facts from Trial

#### A. The capital murder

The Texas Court of Criminal Appeals (CCA) summarized the facts of Batiste's murder of Horace Holiday as follows:

> In the early morning hours of April 19, 2009, [Batiste], a member of the Five Deuce Hoover Crips, was at home getting some tattoos, when he looked in the mirror, thinking about all of his bills. He asked his friend, Loc, to "ride around" in his Buick with him looking for something to steal because "that's the way you get money." . . . [Batiste] saw a white Cadillac coming out of the parking lot, and he decided that he wanted the Cadillac's fancy rims. "I just look at the rims, and I know what the rims are worth. . . . I could get $3,000 on the streets."
>
> [Batiste] started following the Cadillac, and they drove for miles down the freeway. Eventually the driver must have noticed him, because the Cadillac began "swanging" from the right to the left

> lane and back again. [Batiste] was scared because the driver was acting "street smart," but he [did not] want to show any fear because he and Loc were Crips, so he told Loc to lean back while [Batiste] pulled up even with the Cadillac and started shooting at the driver through Loc's passenger window. He shot the driver four or five times with his nine-millimeter, semi-automatic Glock pistol.
>
> The Cadillac exited the freeway, pulled into an Exxon station, and ran into one of the gas pumps. [Batiste] drove into the station and saw the badly wounded driver slowly come out of the Cadillac, crying "Help, help, help." The man collapsed on the concrete. [Batiste] thought, "[M]an, this is my chance. I got to get those wheels. . . . And I got my gun, and I put my hat on, and I had a ski mask." He told Loc to drive the Buick to [Batiste's] wife's apartment, and then [Batiste] ran over to where Mr. Holiday, the driver, was lying on the ground. When he saw the man move, he shot him several more times in the back and head. Mr. Holiday died.
>
> [Batiste] jumped into the Cadillac and drove out of the Exxon station and back onto the Eastex freeway, heading north. He soon noticed a police car behind him and realized that he would be caught, but first he led the pursuing officers on a high-speed chase for about twelve miles. It was not until officers placed a spike strip across the road and [Batiste] ran over it, destroying the Cadillac's passenger-side tires, that he was finally forced to stop.
>
> [Batiste] was taken into custody and placed in a patrol car. . . . After [Batiste] was taken to the homicide division, he gave officers a recorded statement confessing to the capital murder of Horace Holiday.

*Batiste v. State*, 2013 WL 2424134, at *1–2 (Tex. Crim. App. 2013) (footnote omitted).

### B. The State's punishment case

The CCA summarized the evidence presented by the State at the punishment phase of trial:

> During the punishment phase, the State offered evidence that, on March 23, 2009 (a little more than three weeks before killing Horace Holiday), [Batiste] robbed Walter Jones, his wife, Kari, and David McInnis, at the Phat Kat Tats tattoo shop. . . . [Batiste] and two cohorts marched into the shop, wearing blue bandanas over their faces and carrying semi-automatic pistols. [Batiste] screamed, "This is a fucking robbery!" Each of the robbers grabbed one of the three adults, and each put a gun to that person's head. Walter Jones, the owner of Phat Kat Tats, noticed that these robbers were well organized and likely had done this before. . . . The robbers made them empty out their pockets. Disappointed with the result, the robbers then scooped up two laptops, several cell phones, a digital camera, and three tattoo machines. They ran out of the shop and fled in [Batiste's] Buick. . . .
>
> Two weeks later—shortly after midnight on April 8, 2009—[Batiste] drove his Buick through the strip-mall center where the Black Widow tattoo parlor was located. . . . He backed his Buick into a parking slot in front of the shop, and then he and two other men walked into the tattoo parlor. Steve Robbins, the shop's owner, was tattooing Joshua's arm, while two of Joshua's friends—Anthony and Christie—were napping on the couch. Two of the robbers held Anthony and Christie at gunpoint, while the third robber went toward the back where Steve was tattooing Joshua. [Batiste] and the other two robbers were yelling and "cussing" at everyone, demanding money and wallets. When Steve told the robbers that they had gotten all the money and they should leave because the store had surveillance cameras, [Batiste] turned back to him and said, "What, motherfucker?" and began shooting Steve. [Batiste] and another robber shot a total of sixteen bullets before they finally fled in [Batiste's] Buick. Steve died.
>
> The State also introduced evidence of [Batiste's] long criminal history, his gang-related activities, and his various acts of violence and intimidation while in jail.

*Id*. at *2.

### C. The defense's case

The CCA summarized the evidence presented by the defense at the punishment phase of trial:

> During his punishment case, [Batiste] called a dean from the University of Houston to testify to the TDCJ inmate classification system and life in prison. He also called a high-school track and football coach who said that [Batiste] was a gifted athlete in middle school, but that he "disappeared" after he got into trouble for car thefts. [Batiste's] former boss testified that [Batiste] worked at Forge USA for over six months as a helper on the forging crew. He never had any problems with [Batiste]. [Batiste's] girlfriend, Stephanie Soliz, testified that she and [Batiste] lived together with her two children, one of whom was fathered by [Batiste]. [Batiste] was "the best" father. Stephanie admitted that they smoked a lot of marijuana at home and that [Batiste] had a second job as a "fence" for stolen property. She was "okay" with [Batiste] selling stolen property, as long as he [was not] doing the stealing himself.
>
> [Batiste's] younger brother, Kevin Noel, testified that [Batiste] was "a very caring and loving brother." He did not try to get Kevin to commit crimes or join the Crips gang, but Kevin did join the Line Five Piru Bloods gang and has the gang's tattoos. Kevin would pick [Batiste] up from work and bring him back to his apartment where Kevin smoked dope with [Batiste] and Stephanie. [Batiste] would write him letters from jail suggesting various new gang tattoos and bragging about having sex with a nurse in the infirmary. [Batiste] also wrote a letter from the jail to a friend telling him that he had broken his hand fighting with "a white guy from the military." When that man had interfered with [Batiste's] phone call, [Batiste] broke his jaw.
>
> Darlene Beard testified that [Batiste] was her "favorite grandson." She took care of him until he was nine years old. After that, she saw him every Thanksgiving, and sometimes on her birthday or Mother's Day. She never saw [Batiste] do anything bad. "I can only tell you about the good things that I know concerning my

grandchild." Mrs. Beard said that [Batiste] has a "huge" family and does not have any conflict with any member of that family. [Batiste's] mother testified that she was barely sixteen when [Batiste] was born, so her mother took care of him while she finished high school. He was a healthy, happy, church-going child without any mental-health or learning problems until he started getting into trouble in middle school. She knew that [Batiste] was sent to TYC[1] for stealing cars, but he never told her about his other crimes, being in a gang, or having gang tattoos.

[Batiste] testified that he had a happy childhood, but when he was in middle school, he began selling Ritalin because he wanted to make money. After he was caught, he was sent to an alternative school for the rest of eighth grade and half of ninth grade. [Batiste] said that, after TYC, he committed crimes "just like to keep money in my pocket, keep everything I needed." [Batiste] stated that he spent some of his money on marijuana for Stephanie and himself, but he [did not] commit crimes to get drug money. He said that he really loves his two boys, Kash and Alex, and would guide them and tell them "what's right, what's wrong."

[Batiste] testified that he could be a positive influence on people in prison, and he would distance himself from the Crips members "and just pick different goals." [Batiste] stated that he had followed the jail rules "[t]o the best of my ability. . . . Everytime, it's always mutual combat. It's never been where I just hit somebody. I hit them back." But [Batiste] did admit that, when faced with the choice to show empathy and help Horace Holiday, who was bleeding to death on the concrete, [Batiste] made the choice to shoot him several more times and steal his car.

. . .

[Batiste] agreed that he recruited the gang members for the Phat Kat Tats robbery and told them what to do. He admitted that he was the leader in the Black Widow capital murder as well. And he said that those were not his first robberies.

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1 The Texas Youth Commission

*Id*. at *3–4 (footnote added).

### D. Trial counsels' mitigation investigation

Prior to trial, trial counsel sought and obtained funding to retain a mitigation expert and several experts to serve as consulting and/or testifying experts. CR 8–10, 63–65, 96–106, 159–71.[2] In trial counsels' motion seeking appointment of and funding to retain their mitigation investigator, trial counsel explained that she would investigate Batiste's background to obtain a family and social history, interview Batiste's family members, and obtain Batiste's mental and physical health records, educational records, and employment records. CR 98. Before trial commenced, trial counsel submitted an interim voucher for the mitigation investigator's work in support of a motion seeking funding to secure additional services from her. CR 163–70. The interim voucher reflected the mitigation investigator had conducted seventy-seven hours of work, reviewed records, conducted several interviews, and consulted with the defense's experts. CR 163–70. Trial counsel also obtained the services of an investigator and a criminal justice expert. CR 107–09, 860.

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[2] "RR" refers to the "Reporter's Record," the state record of transcribed trial and punishment proceedings, preceded by the volume number and followed by the internal page number(s). "CR" refers to the "Clerk's Record," the transcript of pleadings and documents filed in the trial court, preceded by the volume number and followed by the internal page number(s). The State's exhibits will be cited to as "SX" and the Defense's exhibits will be cited to as "DX." "SHCR" refers to the Clerk's Record of pleadings and documents filed with the state habeas court. *See generally Ex parte Batiste*, No. 81,570-01.

Additionally, trial counsel retained three mental-health experts—two clinical psychologists and a substance abuse expert. CR 69–95, 132–58. In trial counsels' motion seeking appointment of and funding to retain their mental health experts, trial counsel stated the experts would "need to review and analyze school and psychological records for the defendant." CR 71, 134, 147.

The voucher of one of the defense's clinical psychologists was submitted during Batiste's state habeas proceedings. As detailed in the voucher, the expert conducted a four-hour forensic interview of Batiste, reviewed Batiste's records, and consulted with the defense team's investigator and another defense expert. SHCR-01 at 715–25. The defense's substance abuse expert's voucher was also submitted during Batiste's state habeas proceedings and reflected that he interviewed Batiste for eleven hours, spent approximately nine hours reviewing records, and consulted trial counsel and their mitigation investigator. SHCR-01 at 732.

Trial counsel submitted affidavits to the state habeas court in which they discussed the defense team's mitigation strategy. SHCR-01 at 810–13, 815–21. Trial counsel explained they were of the opinion that Batiste's guilt was "indefensible," thus the defense's chance to obtain a favorable verdict on the future dangerousness special issue was "fairly hopeless." SHCR-01 at 815–16.

As a result, mitigation was their "best, and really, only opportunity to save [Batiste's] life at trial."[3] SHCR-01 at 816.

With regard to Batiste's assertion that he suffered from frontal lobe damage, trial counsel stated they "had no information from any source," including the defense team's experts, "that would indicate a frontal lobe disorder, or any mental disorder." SHCR-01 at 817. Indeed, trial counsel stated that Batiste was "very sharp." SHCR-01 at 817. Trial counsel explained that he was "very careful not to call witnesses, especially experts, who on cross[-]examination [could] destroy our case." SHCR-01 at 817.

At trial, the prosecution presented the testimony of Dr. Scott Krieger, a psychologist and counselor who worked for TYC as an associate clinical psychologist. 18 RR 34–97. As part of his work for TYC, Dr. Krieger interviewed incoming youths to make treatment and placement recommendations. 18 RR 40. Dr. Krieger's assessment of the youths was intended, in part, to rule out mental or cognitive disorders. 18 RR 41.

Dr. Krieger interviewed Batiste when he was placed in TYC at the age of sixteen. 18 RR 42. As part of his evaluation of Batiste, Dr. Krieger

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[3] Trial counsel also vigorously attempted for several months to obtain a plea offer from the State. SHCR-01 at 816. Trial counsel were successful in obtaining an offer of life imprisonment without parole conditioned on Batiste providing the name of one of his cohorts. SHCR-01 at 816. Batiste declined the offer because he would not identify the cohort due to Batiste's gang's "code of honor." SHCR-01 at 816.

administered the Minnesota Multiphasic Personality Inventory-Adolescent Version (MMPI-A), the Beck Depression Inventory, and the Substance Abuse Subtle Screening Inventory. 18 RR 42–43. Dr. Krieger also reviewed Batiste's file, which included a prior psychological screening that was conducted by Dr. Scott Cardin the year prior. 18 RR 45–46. Dr. Cardin had diagnosed Batiste with disruptive behavior disorder and cannabis dependence. 18 RR 48. Dr. Cardin's report indicated he recommended that Batiste receive, *inter alia*, impulse control support. CR 214. Dr. Krieger testified that there was no indication in the records that Batiste had a family history of emotional disorder, intellectual disability, or abuse. 18 RR 49.

During Dr. Krieger's interview of Batiste, Batiste admitted to stealing cars for money, carrying a weapon, selling drugs, fighting in school, and using marijuana. 18 RR 50–51. Batiste also admitted that he had committed several car thefts in addition to the few instances for which he was caught. 18 RR 51. Batiste told Dr. Krieger that he refused to think about his victims because doing so made him feel "irritable." 18 RR 51–52. Dr. Krieger diagnosed Batiste with conduct disorder, which is characterized by a repetitive and persistent pattern of behaviors that result in the violation of the rights of others. 18 RR 53.

Dr. Krieger also evaluated Batiste's personality and emotional functioning. 18 RR 57–58. Batiste's scores on the MMPI-A indicated he was

hyperactive, impulsive, distractible, and restless and that he preferred action over thought and reflection. 18 RR 59. Batiste's score in this area was the "highest of [Batiste's] elevations." 18 RR 60.

On cross-examination, Dr. Krieger testified that a youth's trust issues like those exhibited by Batiste can be caused, for example, by a father beating the youth's mother. 18 RR 68. Batiste told Dr. Krieger he was raised in a violent neighborhood, had been shot at, and had been hit in the head with a gun. 18 RR 70. Dr. Krieger testified that Batiste's being raised in a violent community, lack of a father figure, and dropping out of school were risk factors for Batiste that could cause him to exhibit poor judgment and conduct. 18 RR 72–73, 80–81. Indeed, Dr. Cardin had indicated in his report that Batiste had psychological stressors in his home environment. 18 RR 87; DX 6. Further, Dr. Krieger testified that a measure of Batiste's functioning while in TYC showed that he was benefitting from TYC's structured environment. 18 RR 74, 76. Trial counsel introduced into evidence the reports of Dr. Krieger and Dr. Cardin. DX 6, 7.

## II. Procedural History

Batiste was convicted and sentenced to death for the murder of Horace Holiday. 17 RR 3; 25 RR 81; 1 CR 38; 11 CR 1702, 1712-17. The CCA upheld Batiste's conviction and death sentence on direct appeal. *Batiste v. State*, 2013 WL 2424134, at *17, *cert. denied*, 134 S. Ct. 1000 (2014). Batiste filed a state

application for a writ of habeas corpus. *Ex parte Batiste*, No. 81,570-01. The trial court entered findings of fact and conclusions of law. Pet'r's App'x 5. The CCA denied Batiste's state habeas application based on the trial court's findings of fact and conclusions of law and its own review. Pet'r's App'x 4.

Batiste then filed a federal habeas petition. The district court denied the petition and denied a COA. Pet'r's App'x 3. Batiste next filed in the Fifth Circuit an application for a COA, which the court denied. Pet'r's App'x 1. Batiste then filed in this Court a petition for a writ of certiorari. The instant Brief in Opposition follows.

## ARGUMENT

### I. Batiste's Petition Relies Entirely on Dictum that Is Not Applicable to His Case.

Batiste argues that the Court should grant certiorari review to correct the district court's application of § 2254(d) to his IATC claim.[4] Pet. Cert. at 6–

[4] It should be noted at the outset that Batiste refers to the "procedural bar" of § 2254(d). Pet. Cert. at 9 n.9. But § 2254(d)(1) and (2) are not procedural obstacles. Rather, they establish the deferential standard that a federal court must apply in addressing the *merits* of the petitioner's claims. *See Gonzalez v. Crosby*, 545 U.S. 524, 532 n.4 (2005); *Woodford v. Garceau*, 538 U.S. 202, 207 (2003) (for purposes of § 2254(d), an application for habeas corpus relief is a filing that seeks "an adjudication on the *merits* of the petitioner's claims") (emphasis in original). Batiste also asserts that the state habeas court's procedures in his case were inadequate. Pet. Cert. at i. He does not, however, clearly seek review in this Court based on that assertion. Nonetheless, deference under AEDPA applies even when a state habeas court does not hold an evidentiary hearing on the merits of a petitioner's claims. *Valdez v. Cockrell*, 274 F.3d 941, 948 (5th Cir. 2001); *Green v. Thaler*, 699 F.3d 404, 415–16 (5th Cir. 2012) (rejecting argument that deference under AEDPA does not apply where the state habeas court adopts the State's proposed findings verbatim).

18. He argues that the Court's recent decision in *Wilson* overruled Fifth Circuit precedent, which holds that a federal court's review under § 2254(d) of a state court denial of habeas relief focuses on whether the state court's ultimate conclusion was unreasonable "and not on whether the state court considered and discussed every angle of the evidence." *Langley v. Prince*, 890 F.3d 504, 515 (5th Cir. 2018), *reh'g granted*, 905 F.3d 924 (5th Cir. 2018); *Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002); *see* Pet. Cert. at 9–10. But *Wilson* did not abrogate the Fifth Circuit's ultimate-conclusion-not-reasoning methodology of reviewing state-court decisions under § 2254(d). And more importantly, the district court in this case "trained its attention on the particular reasons" why the state court denied Batiste's IATC claim. *Wilson*, 138 S. Ct. at 1191. Consequently, Batiste does not present a compelling reason warranting this Court's attention and his petition should be denied.

### A. The Court did not hold in *Wilson* that federal courts must entirely limit their review of reasoned state court decisions to the reasons provided by the state court for denying relief.

First, *Wilson* did not abrogate the Fifth Circuit's ultimate-conclusion-not-reasoning methodology. While *Wilson* suggests that the proper focus under § 2254(d) is the state-court opinion, it did not so hold. *Id.* at 1192 ("[If a state court issues a reasoned opinion,] a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are

reasonable."); *see also id*. at 1195 ("For one thing, [*Harrington v.*] *Richter*[, 562 U.S. 86 (2011)] did not directly concern the issue before us—whether to 'look through' the silent state higher court opinion[.]"). Indeed, the Court explicitly described the issue before it, and it was not the methodology of § 2254(d) review—"The issue before us . . . concerns how a federal habeas court is to find the state court's reasons when the relevant state-court decision on the merits, say, a state supreme court decision, does not come accompanied with those reasons." *Id*. at 1192. Because *Wilson* was not deciding the proper methodology for review under § 2254(d), and because that portion of the opinion suggesting focus on state-court reasoning is obiter dictum, it does not abrogate the Fifth Circuit's ultimate-conclusion-not-reasoning precedent. *See Thomas v. Vannoy*, 893 F.3d 561, 568 (5th Cir. 2018) ("[T]he *Wilson* Court was only directly concerned with a state court order 'that was made without any explanatory opinion' whatsoever.").

Second, even if *Wilson* were read to abrogate the ultimate-conclusion-not-reasoning methodology, it is not clear it would apply to Texas postconviction review generally or to this case in particular. That is because, in denying Batiste's state habeas application, the CCA included the following language—"Based upon the trial court's findings and conclusions *and our own review of the record*, relief is denied." Pet'r's App'x 4 at 2 (emphasis added). While the CCA adopted the state habeas trial court's findings, the findings

were not the *only* basis for the CCA's decision—it was also based on the CCA's "own review of the record." *See Wilson*, 138 S. Ct. at 1203 (Gorsuch, J., dissenting) ("What if the state supreme court says something slightly different but to the same effect, declaring in each case that it has independently considered the relevant law and evidence before denying relief?"). Thus, it is not clear that *Wilson*'s possible abrogation of the Fifth Circuit's ultimate-conclusion-not-reasoning methodology applies. In short, the CCA's decision is both reasoned (by adopting the findings) and unreasoned (by denying on its own review). Accordingly, *Richter*'s "could have supported" standard of review still applies. *Richter*, 562 U.S. at 102.

Third, Batiste's case is not one where the district court substituted its "thought as to more supportive reasoning" for the state court's decision. *Wilson*, 138 S. Ct. at 1197. Here, the state court provided multiple justifications for why Batiste's IATC claim failed as to both the deficiency and prejudice prongs of *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *See* SHCR at 950–52, 978. And the Court has explained that, if a state court provides multiple grounds for denying a claim, they must all be objectively unreasonable for an inmate to satisfy § 2254(d). *See, e.g.*, *Parker v. Matthews*, 567 U.S. 37, 42 (2012) (per curiam); *Wetzel v. Lambert*, 565 U.S. 520, 525 (2012) (per curiam). Thus, even if *Wilson* abrogated the ultimate-conclusion-not-reasoning methodology, it does not speak to a case, like here, where the state court provided multiple

bases for denying a claim. Consequently, Batiste poses no reason justifying this Court's review.

### B. Even if *Wilson* provided the controlling standard, Batiste is not entitled to certiorari review because the district court trained its attention on the reasons provided by the state court for rejecting his IATC claim.

Batiste argues that the district court failed to conduct the appropriate review under § 2254(d) and *Wilson* because it did not scrutinize the state court's reasoning for rejecting his IATC claim. Pet. Cert. at 7. He argues that the lower courts only considered whether the state court's ultimate conclusion was unreasonable. Pet. Cert. at 9–10. But the district court appropriately examined the state court's findings at length and concluded the state court's rejection of the IATC claim was reasonable. Consequently, even assuming *Wilson* silently overruled Fifth Circuit precedent and mandated that federal courts focus their attention on the specific reasons provided by the state court for rejecting a petitioner's claim, Batiste provides no reason justifying this Court's attention because the lower courts have already conducted an analysis consistent with *Wilson*.

Batiste's IATC claim alleged that trial counsel were ineffective for failing to investigate and present evidence of frontal lobe damage, which he argued was the source of his impulsivity. Pet'r's App'x 1 at 8. He presented the claim to the state habeas court supported by an affidavit of Dr. Underhill who

speculated that Batiste's frontal lobe damage was caused by his contracting meningitis when he was about nine months old. Pet'r's App'x 7 at 8.

The state habeas court rejected the claim, finding that trial counsel elicited testimony regarding Batiste's impulsivity from a prosecution witness. Pet'r's App'x 5 at 16; SHCR-01 at 950. Further, the court found that trial counsel conducted a mitigation investigation with the assistance of three mental health experts and that trial counsel had no information indicating that Batiste suffered from frontal lobe damage. Pet'r's App'x 5 at 16–17; SHCR-01 at 950–51. The court also found Dr. Underhill's proffered opinion unpersuasive because it was vague and because his conclusion that Batiste was unable to choose to regulate his risk-taking behavior was contradicted by the fact that Batiste had a prior incarceration during which he did not have a disciplinary infraction. Pet'r's App'x 5 at 18; SHCR-01 at 952.

The state court concluded that Batiste failed to establish deficiency under *Strickland* because trial counsel performed to prevailing professional norms by obtaining the assistance of three mental health experts, none of whom indicated Batiste suffered from brain damage. Pet'r's App'x 5 at 44; SHCR-01 at 978. The court concluded Batiste failed to show prejudice because Dr. Underhill's proffered opinion was cumulative of the testimony regarding Batiste's impulsivity that trial counsel elicited from a prosecution witness and

because of the aggravating nature of Batiste's extensive and violent criminal history. Pet'r's App'x 5 at 44; SHCR-01 at 978.

Batiste then raised this claim in district court. The district court addressed the claim first by extensively reviewing the evidence presented to the state habeas court and that court's adjudication of the claim. Pet'r's App'x 3 at 13–16. The district court concluded that trial counsel were not deficient. Pet'r's App'x 3 at 17. The district court relied on much the same facts and conclusions as the state habeas court: (1) trial counsel "explored facets of [Batiste's] mental health and background with the assistance of various psychologists" but did not receive information indicating he suffered brain damage; (2) Dr. Underhill's opinion was unpersuasive because Batiste failed to substantiate any of the possible etiologies of frontal lobe disorder;[5] (3) trial counsel could reasonably forego investigating neuropsychiatric disorders where three mental health experts did not indicate such an investigation was necessary; (4) Dr. Underhill's testimony would have been double-edged; and (5) Dr. Underhill's opinion was unpersuasive because Batiste's prior incarceration during which he did not have any disciplinary infractions contradicted Dr. Underhill's assertion that Batiste was unable to regulate his risk-taking

[5] The district court noted the vagueness of Dr. Underhill's opinion that Batiste's frontal lobe damage was caused by his contracting meningitis as a newborn, which was rendered especially vague and unpersuasive because Batiste did not contract meningitis as a newborn. Pet'r's App'x at 7 n.14.

activity *and* because Batiste's violence during his incarceration awaiting his capital murder trial contradicted Dr. Underhill's assertion that incarceration would prevent Batiste from exhibiting risk-taking behavior. Pet'r's App'x 3 at 17–19.

The district court similarly held that Batiste failed to demonstrate the state habeas court's conclusion that he failed to demonstrate prejudice was unreasonable. Pet'r's App'x 3 at 19–21. The district court began by discussing the state habeas court's findings that Batiste's jury was aware that he was impulsive and preferred action over thought and reflection and that his criminal history (two capital murders, aggravated robberies, and multiple bad acts) was overwhelming. Pet'r's App'x 3 at 19. The district court concluded for the same reasons that Batiste could not demonstrate prejudice. Pet'r's App'x 3 at 20–21. The district court specifically noted, as the state habeas court did, Batiste's cold and violent offenses and concluded "the state habeas court was not unreasonable in finding no reasonable probability of a different result from trial counsel's failure to present neuropsychological evidence." Pet'r's App'x 3 at 21.

Contrary to Batiste's assertion, the district court properly "trained its attention on the particular reasons—both legal and factual" why the state court rejected Batiste's IATC claim. *Wilson*, 138 S. Ct. at 1191–92. The district court reviewed the state court's reasoning for reasonableness and found that

the state court's rejection of his claim was not unreasonable. Pet'r's App'x 3 at 12–21. The district court did not, as Batiste asserts,[6] hold that the state court's ultimate conclusion was the focus of its review. Indeed, neither the district court nor the Fifth Circuit referenced *Neal*'s "ultimate conclusion" rationale. Consequently, the district court's decision is not in conflict with *Wilson*. *Cf. Gilkers v. Vannoy*, 904 F.3d 336, 346 (5th Cir. 2018) ("The magistrate judge and district court's analysis of Gilkers's § 2254 claims was consistent with the approach recently espoused by the Supreme Court in *Wilson*.").

Relatedly, Batiste argues that the lower courts failed to determine whether the state court unreasonably determined the facts *and* whether the state court unreasonably applied this Court's precedent. Pet. Cert. at 7. As a result, he argues, the courts could not conclude that the relitigation bar of § 2254(d) applied. Pet. Cert. at 7. Batiste is incorrect. As discussed above, the district court extensively reviewed the state habeas court's findings of fact. Pet'r's App'x 3 at 13–16. For example, the district court discussed, and agreed with, the state habeas court's finding that trial counsel conducted a mental health investigation and that the investigation did not provide trial counsel with any indication that Batiste suffers from frontal lobe damage. Pet'r's App'x 3 at 14–16. Based on those facts, the district court considered whether the state

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6 Pet. Cert. at 12.

court reasonably applied this Court's precedent in *Strickland* and *Rompilla v. Beard*, 545 U.S. 374 (2005). Pet'r's App'x 3 at 16–18. The district court also discussed and agreed with the state habeas court's findings regarding prejudice and concluded that "Batiste has also not shown that the state habeas court was unreasonable in deciding that he did not meet *Strickland*'s prejudice prong." Pet'r's App'x 3 at 19; Pet'r's App'x 3 at 20 ("Insofar as that information has only mitigating value, the jury could consider the effects of evidence similar to that identified on state habeas review."); Pet'r's App'x 3 at 20 (discussing the same aggravating facts relied upon by the state habeas court and concluding "[a]gainst that background, the state habeas court was not unreasonable in finding no reasonable probability of a different result from trial counsel's failure to present neuropsychological evidence"). The district court's opinion plainly shows that it determined the state habeas court both reasonably determined the facts *and* reasonably applied the clearly established precedent of this Court. Pet'r's App'x 3 at 12–21. Consequently, Batiste cannot identify error in the district court's resolution of his IATC claim and his petition should be denied.

Batiste also argues that the Fifth Circuit's "ultimate conclusion" precedent prevented him from presenting various arguments as to why the state habeas court's rejection of his IATC claim was unreasonable by pointing

to the state habeas court's specific findings.[7] Pet. Cert. at 12–17. But as discussed above, Batiste is incorrect. The district court focused its analysis on the state habeas court's adjudication of the claim and concluded Batiste failed to show that the adjudication was based on an unreasonable determination of the facts or an unreasonable application of this Court's precedent. Moreover, nothing prevented Batiste from making the arguments he presses in his Petition. Pet. Cert. at 13–17. In fact, Batiste made many of those arguments in the courts below. For example, Batiste relied upon this Court's opinion in *Porter v. McCollum*[8] in the district court and Fifth Circuit to argue the appropriate prejudice standard under *Strickland*, he argued that trial counsel were deficient despite retaining three mental health experts, he argued that Dr. Underhill's opinion was not cumulative of Dr. Krieger's trial testimony, and he argued that the state court improperly weighed the aggravating evidence against the mitigating evidence. Application for a COA, *Batiste v. Davis*, No. 17-70025, at 25, 34–35, 41, 48–49 (5th Cir. March 5, 2018). Nonetheless, as discussed below in Section III, none of Batiste's arguments

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[7] Batiste's parsimonious approach to the state habeas court's reasoning is not the proper approach. *See Johnson v. Williams*, 568 U.S. 289, 300 (2013) (stating that "federal courts have no authority to impose mandatory opinion-writing standards on state courts"); *Meders v. Warden, Ga Diag. Prison*, 911 F.3d 1335, 1350–51 (11th Cir. 2019) (rejecting the argument that *Wilson* mandated "flyspecking" state court's opinions).

[8] 558 U.S. 30, 40 (2009).

demonstrate that the state habeas court unreasonably determined the facts or unreasonably applied this Court's precedent. Consequently, Batiste's petition should be denied.

## II. The Fifth Circuit Conducted a Threshold COA Analysis and Properly Determined that Batiste Was Not Entitled to a COA.

Batiste next argues that the Fifth Circuit improperly denied a COA because the district court's analysis of his IATC claim was inadequate under the standard suggested in *Wilson* and he did not have the opportunity to address the impact of *Wilson* to his case. Pet. Cert. at 18–22. He also argues the Fifth Circuit's denial of a COA constituted a merits adjudication rather than a threshold COA determination. Pet. Cert. at 18–22. But Batiste briefed the purported impact of *Wilson* to his case on several occasions in the Fifth Circuit. And as discussed above, the district court conducted the analysis suggested in *Wilson* by training its attention on the state habeas court's reasoning. Moreover, the Fifth Circuit conducted an appropriate threshold COA analysis of the district court's rejection of Batiste's IATC claim, and the court's denial of a COA was plainly appropriate. Consequently, Batiste poses no reason justifying this Court's attention.

### A. The district court conducted the analysis this Court suggested in *Wilson*.

As discussed at length above, the district court conducted the analysis this Court suggested in *Wilson* by training its attention on the state habeas

court's factual and legal reasons for rejecting Batiste's IATC claim. Neither the district court nor the Fifth Circuit applied the "ultimate conclusion" rationale to the state habeas court's adjudication of the claim. That being the case, Batiste's argument that the Fifth Circuit erred in failing to grant a COA based on *Wilson* simply fails.

### B. The Fifth Circuit appropriately conducted a threshold COA review.

Batiste argues that the Fifth Circuit "misapplied" 28 U.S.C. § 2253(c) by conducting a review of the merits of his IATC claim rather than a threshold COA analysis. Pet. Cert. at 19. Batiste is incorrect.

The Fifth Circuit stated its reasoning plainly:

> We agree with the district court that reasonable jurists could not debate whether the state habeas court was unreasonable in finding that trial counsel lacked reason to investigate further and develop that Batiste's cognitive deficit may have been caused by frontal lobe damage due to meningitis in infancy. . . . On review of the state court's denial of Batiste's mitigation ineffectiveness claim, jurists of reason could not debate whether the state habeas court acted contrary to or unreasonably applied *Strickland* in concluding that Batiste failed to make "a substantial showing of the denial of a constitutional right" because Batiste's trial counsel acted in an objectively reasonable manner in investigating, selecting and presenting mitigation evidence.

Pet'r's App'x 1 at 10–11 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003)). This was an appropriate COA finding and it was based on an appropriately limited threshold inquiry. *Miller-El*, 537 U.S. at 327. The Fifth Circuit's reference to the district court's opinion was not improper as Batiste

suggests because a circuit court *must* "look to the district court's application of AEDPA to [a] petitioner's constitutional claims and ask whether that resolution was debatable among jurists of reason."[9] *Id.* at 336. Consequently, Batiste's assertion that the Fifth Circuit applied too high a burden at the COA stage is incorrect. Pet. Cert. at 20.

Importantly, the Fifth Circuit's opinion reflects that it did not engage in a probing merits analysis of the merits of Batiste's IATC claim. Its discussion of the claim required scarcely more than three pages. Pet'r's App'x 1 at 8–11. The Fifth Circuit did not rest its denial of a COA on a coextensive merits analysis. Rather, as discussed above, the Fifth Circuit's analysis was properly focused on the district court's opinion[10] and the reasons that court gave for rejecting Batiste's IATC claim. Pet'r's App'x 1 at 8–11. Consequently, Batiste's petition should be denied.

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[9] The Fifth Circuit's comment that it "agree[d] with the district court" also does not reflect a merits determination because the district court also denied Batiste a COA. Pet'r's App'x 3 at 84–85. Given that both the district court and the Fifth Circuit concluded that it was not debatable that the state habeas court's adjudication of Batiste's IATC claim was reasonable, it is unsurprising and entirely appropriate that the Fifth Circuit stated that it "agree[d]" with the district court in that respect. Pet'r's App'x 1 at 10.

[10] By contrast, the district court's discussion of the merits of Batiste's IATC claim was quite detailed and covered almost ten pages. Pet'r's App'x 3 at 12–21.

### C. Batiste addressed the purported impact of *Wilson* to his case on several occasions in the court below.

Lastly, Batiste argues that he lacked the opportunity in the court below to address the impact of *Wilson* to his case. Pet. Cert. at 20–22. But Batiste addressed that issue on *four* occasions in the Fifth Circuit—in his Reply to the Director's Response to his application for a COA,[11] in his Response to the Director's letter brief regarding *Wilson*, and in two petitions for rehearing following the denial of his application for a COA. At each step, Batiste pressed the same argument he does now—that *Wilson* rendered the district court's analysis of his IATC claim incorrect. That the Fifth Circuit did not agree with Batiste does not mean it ignored or improperly applied *Wilson*. Rather, as discussed above, the Fifth Circuit's denial of a COA simply reflects the fact that the district court has already conducted the analysis suggested by this Court in *Wilson*. Consequently, his petition does not present any reason justifying this Court's attention and it should be denied.

## III. The Court Should Deny Batiste's Petition Because His IATC Claim Is Unworthy of this Court's Attention.

As discussed above, Batiste raised a claim in his federal habeas petition alleging that trial counsel were ineffective for failing to present expert testimony that he suffered from frontal lobe damage, which impaired his

[11] Batiste sought leave from the Fifth Circuit to file a Reply to address *Wilson*. The Fifth Circuit granted leave and Batiste filed a Reply.

ability to control risk-taking. In support of the claim, Batiste relied on the affidavit of Dr. Underhill who speculated that Batiste's frontal lobe damage may have been caused by his having contracted meningitis while a newborn. SHCR-01 at 273. The district court properly rejected the claim and the Fifth Circuit properly denied a COA.

**A. Batiste's claim is patently meritless.**

First, trial counsel were not deficient for failing to present expert testimony that Batiste suffered from frontal lobe damage that caused him to engage in risk-taking behavior because such evidence is at best double-edged, and trial counsel could not be ineffective for failing to present it. *See Burger v. Kemp*, 483 U.S. 776, 812 (1987). Moreover, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690. Trial counsels' strategy was informed by the assistance of a mitigation investigator and *three* mental-health experts, none of whom indicated that Batiste might suffer from frontal lobe damage. SHCR-01 at 950–51. Also, trial counsel were aware of Batiste's prior psychological testing by Drs. Cardin and Krieger showing Batiste to be impulsive. CR 211–14, 659–64. Knowing that the State possessed mental-health evidence regarding Batiste's impulsivity, trial counsel successfully elicited mitigating testimony from Dr. Krieger on cross-examination to defuse the aggravating impact of his testimony and to attribute

Batiste's behavior to his troubled upbringing. 18 RR 81 (Dr. Krieger's testimony that the risk factors applicable to Batiste, e.g., the lack of a father figure, could subject Batiste to exhibit "bad conduct, poor judgment"). Batiste has not rebutted the presumption that the strategy employed by trial counsel was reasonable. *See Strickland*, 466 U.S. at 689 (stating that "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight").

Additionally, where trial counsel obtained expert assistance to investigate a defendant's mental health, counsel are not required to canvas "the field to find a more favorable defense expert." *Dowthitt v. Johnson*, 230 F.3d 733, 748 (5th Cir. 2000). Batiste's complaint that trial counsel did not retain a psychiatrist and a neuropsychologist in addition to the defense's psychological and substance abuse experts (and the psychological evaluations conducted by Drs. Krieger and Cardin) does not demonstrate that trial counsel were constitutionally deficient. *See Hinton v. Alabama*, 571 U.S. 263, 275 (2014) ("The selection of an expert witness is a paradigmatic example of the type of strategic choice that, when made after thorough investigation of the law and facts, is virtually unchallengeable.") (internal quotation marks and alterations omitted). In light of the fact that trial counsel conducted a thorough and well-funded investigation that did not reveal evidence of frontal lobe damage, Batiste cannot rebut the presumption that trial counsels' informed,

strategic decisions as to how to allocate their limited resources were reasonable. *Richter*, 562 U.S. at 107 (trial counsel are "entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies"). The Constitution requires that trial counsel perform reasonably; it does not *require* that trial counsel retain a psychiatrist or a neuropsychologist.

This is especially true here where trial counsels' investigation revealed evidence of Batiste's impulsivity and where trial counsel presented evidence to the jury attributing that impulsivity to Batiste's troubled upbringing. Specifically, Dr. Krieger testified on cross-examination that Batiste's being raised in a violent community, his lack of a father figure, and his dropping out of school were risk factors for Batiste that could cause him to exhibit "poor judgment" and "bad conduct." 18 RR 72–73, 79–81. And Dr. Cardin indicated in his report that Batiste had psychological stressors in his home environment. 18 RR 87; DX 6. Further, Dr. Krieger testified that a measure of Batiste's functioning while in TYC showed that he was benefitting from TYC's structured environment.[12] 18 RR 75–77. Trial counsel cannot be deficient for

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[12] Trial counsel's closing argument attributed Batiste's behavior to the lack of a father figure or positive male role model. 25 RR 22 ("All these guys are supposed to be his male figures, Jerome, all these people. Did you see them come up here? No. They are the ones that are responsible for the predicament that led to this predicament."), 25 (arguing that Batiste lacked a father figure to teach him life lessons and did not "have anybody that cared enough to teach him any of those

failing to present their own expert to testify about the same material they elicited from Dr. Krieger where Dr. Underhill could only speculate as to a different source of Batiste's behavioral problems. *See Wilson v. Warden, Ga. Diag. Prison*, 898 F.3d 1314, 1323–24 (11th Cir. 2018) (holding that petitioner failed to demonstrate trial counsel were ineffective for failing to present speculative expert testimony that the petitioner suffered from brain damage where the proffered expert testimony conflicted with other evidence and was cumulative of evidence presented at trial).

Batiste also cannot demonstrate that trial counsel were deficient for failing to present the nebulous and speculative testimony of Dr. Underhill. As noted above, Dr. Underhill speculated that Batiste's purported frontal lobe damage may have been caused by his contracting meningitis as a neonate. SHCR-01 at 273. Batiste has argued that the fact that his frontal lobe damage was caused by neonatal meningitis would lead a jury to conclude that he bore no blame for his deficits (nor, presumably, for his crimes). But Batiste did not contract meningitis as a neonate. Rather, he contracted the disease when he was about nine months old.[13] DX 20 (Batiste's medical records from his

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lessons"). Trial counsel also argued that Batiste could not "make a decision" in the free world but would respond well if he was in a "structured environment. 25 RR 23.

[13] A neonate is "a child less than a month old." https://www.merriam-webster.com/dictionary/neonate; *see* Pet'r's App'x 3 at 18 n.14.

treatment for meningitis). Dr. Underhill's affidavit did not address whether the same risk for frontal lobe damage is present when an older baby contracts meningitis.[14]

And critically, Batiste's argument relied heavily on the assertion that trial counsel should have suspected that Batiste's meningitis caused frontal lobe damage because readily-accessible information showed meningitis may cause brain damage when treatment is delayed. Brief of Appellant at 27–28, *Batiste v. Davis*, No. 17-70025 (5th Cir. March 5, 2018) ("*Delayed treatment increases the risk of permanent brain damage or death*. . . . The longer your child has [meningitis] without treatment, the greater the risk of seizures and *permanent neurological damage, including . . . [b]rain damage*.") (emphasis in original); *see* Pet. Cert. at 14 n.15. But nothing suggested to trial counsel that Batiste's treatment for meningitis was delayed at all. 24 RR 98 (Batiste's mother's trial testimony that Batiste did not suffer from mental deficiencies or learning disabilities as he grew up). Indeed, the defense team created a memorandum of a pre-trial interview with Batiste's mother during which she stated Batiste was "rushed" to the emergency room when he contracted

[14] Trial counsel presented evidence that Batiste contracted meningitis when he was a baby. 24 RR 98. Consequently, Batiste cannot show that trial counsel were deficient for failing to uncover and present evidence that he contracted meningitis when he was a child.

meningitis.[15] Her trial testimony was corroborated by Batiste's medical records (which trial counsel admitted into evidence) that stated Batiste became sick the same day he was taken to the hospital. DX 20. ("This is an 8 month old black male who was well until this morning when the mother noted that he was not taking food well and was acting very irritable."). Even in Batiste's mother's 2013 affidavit, there is no evidence that Batiste's treatment was delayed. SHCR-01 at 518 (Batiste's mother's post-conviction statement that "[Batiste] was hollering in his sleep and we took him to the emergency room. . . . [The doctors] said he had meningitis of the brain and he had to stay in intensive care for almost two weeks. The doctors told me that if I had waited any longer to take Teddrick to the hospital he would have died."). Batiste has failed to explain whether—let alone present evidence that—the risk of brain damage resulting from meningitis exists when treatment is not delayed.

Further, Batiste fails to show prejudice. Trial counsel presented an extensive mitigation case detailing Batiste's upbringing, employment history, and family life with his girlfriend and sons. *See Batiste v. State*, 2013 WL 2424134, at *3 (the CCA's discussion of the mitigating evidence presented at Batiste's trial). But most importantly, the jury was presented with the very

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[15] The memorandum was provided by Batiste to the district court along with his response to the Director's motion for summary judgment. *Batiste v. Davis*, No. 4:15-CV-1258 (S.D. Tex. Aug. 15, 2017), Docket Entry 38-5.

evidence Batiste now complains went unpresented. As detailed above, Dr. Krieger testified for the State that Batiste's scores on the MMPI-A showed that he was impulsive and that he preferred action over thought and reflection. 18 RR 59. In an effort to rebut that aggravating evidence, trial counsel elicited testimony on cross-examination that Batiste's behavior was the result of his troubled upbringing and that Batiste had benefitted from the structured environment of TYC. 18 RR 68–90. Consequently, Batiste's jury was well-aware that he had been diagnosed by a mental health professional as having deficits in controlling his risk taking that could potentially be addressed if Batiste was incarcerated, and he could not have been prejudiced by trial counsels' decision to not present additional evidence to the same effect. *See Strickland*, 466 U.S. at 695. Indeed, a jury would likely discount a defense expert's opinions as being overly favorable to the defendant. But here, trial counsel elicited the mitigating evidence from a prosecution witness.

Moreover, Batiste cannot show prejudice because Dr. Underhill's conclusion that Batiste would not be a danger while in prison was plainly contradicted by the extensive evidence presented by the State showing Batiste's violent and disruptive behavior while incarcerated in jail. For example, a classifications officer at the Harris County jail testified that Batiste had been disciplined numerous times while incarcerated pending trial for the instant capital murder. Specifically, Batiste had been disciplined for, *inter alia*,

fighting three times, assaulting an inmate twice, possessing a weapon, refusing to obey an order, and engaging in a group demonstration. 18 RR 128–49; SX 229–41. The jury was also aware that Batiste had admitted to breaking another inmate's jaw because the inmate allegedly interfered with Batiste's telephone call. 24 RR 69, 145–46.

An inmate in the Harris County jail who was incarcerated at the same time as Batiste testified that he had been incarcerated in the jail prior to Batiste's arrival. 19 RR 110–11. Upon Batiste's arrival in the jail, he and several of his fellow gang members "started to run everything" by picking fights and stealing other inmates' property. 19 RR 112–17. The inmate testified that Batiste was the leader of the troublesome group of inmates. 19 RR 118–19. He was eventually transferred out of the jail after Batiste threatened him because his cellmate had "snitched" on Batiste. 19 RR 132.

Even if trial counsel had presented expert testimony regarding Batiste's purported frontal lobe damage and testimony that the effects of his frontal lobe damage would be controlled in a structured environment, the testimony would have been readily contradicted by the same evidence. As the district court concluded, "[t]estimony that incarceration would squelch Batiste's free-world violent impulsivity would ring hollow against his inability to control himself in a structured environment." Pet'r's App'x 3 at 19. Trial counsel attempted to show that Batiste was remorseful, accepted responsibility for his actions,

would renounce his gang affiliation once in prison, and intended to be a positive role model for his children. 24 RR 121, 126–27. Such evidence carried a better chance for success than Dr. Underhill's speculative attribution of Batiste's impulsivity to frontal lobe damage brought on by childhood meningitis.

Finally, the aggravating evidence in this case was substantial. The prosecution presented evidence of Batiste's extensive criminal history, which began as a juvenile and included multiple car thefts and his joining a gang at an early age. SX 206–09; 18 RR 165. The prosecution also presented evidence that Batiste ran a "fencing" operation selling stolen property out of his family's apartment. 24 RR 170–71. Further, as noted above, Batiste had multiple infractions while incarcerated in jail pending trial for the instant capital murder. 18 RR 128–49; 19 RR 112–32; SX 229–241. And, most importantly, Batiste had committed two aggravated robberies of tattoo parlors in the weeks prior to the instant capital murder, one of which ended in Batiste committing the capital murder of Steve Robbins. Batiste bragged in jail regarding the capital murders and said he had nothing to live for. 19 RR 125–26. In light of the State's overwhelming case in aggravation, Batiste's IATC claim fails. *See Strickland*, 466 U.S. at 695.

The district court properly concluded the state habeas court's rejection of the claim was reasonable, and the Fifth Circuit properly concluded the

district court's decision was not debatable. Batiste presents no reason warranting this Court's attention, and his petition should be denied.

### B. Batiste's various challenges to the state habeas court's findings are meritless.

Batiste raises several challenges to the state habeas court's findings. Pet. Cert. at 13–18. None of Batiste's challenges demonstrate that the state habeas court's denial of his claim was unreasonable.

First, Batiste asserts that the state habeas court improperly rejected his IATC claim based on its conclusion that he failed to prove he suffered from frontal lobe damage, which was an unreasonable application of this Court's opinion in *Porter*. Pet. Cert. at 13. In *Porter*, the state court "did not consider [the petitioner's] mental health evidence in its discussion of" mitigating evidence. 558 U.S. at 43 n.7. Here, the state court considered Batiste's mental health evidence and found that it was cumulative of evidence of trial testimony regarding Batiste's mental health. SHCR-01 at 952, 978. The state court also considered whether Dr. Underhill's opinion was persuasive in light of the evidence that Batiste had been able to control his behavior during a previous incarceration. SHCR-01 at 952, 978. Consequently, the state court did not "discount entirely the effect that [Dr. Underhill's] testimony might have had on the jury or the sentencing judge." *Porter*, 558 U.S. at 43.

Second, Batiste argues that the state habeas court unreasonably concluded that trial counsel did not perform deficiently because they retained three mental health experts, none of whom indicated Batiste might have frontal lobe damage. Pet. Cert. at 13–14. He argues that conclusion was an unreasonable application of *Strickland* and *Rompilla* because deficiency is judged by whether trial counsel unreasonably failed to follow up on information they possessed. Pet. Cert. at 13–14. As discussed above, Batiste's assertion that his purported frontal lobe damage was caused by his contracting meningitis when he was young and his receiving delayed treatment for meningitis was contradicted by the information and records trial counsel possessed at trial. Batiste has pointed to nothing that would alert reasonably diligent counsel to suspect Batiste's treatment for meningitis was delayed or caused him any neuropsychological impairment.

Third, Batiste argues that the state habeas court's conclusion that trial counsel performed effectively by retaining three mental health experts was an unreasonable application of *Strickland* and *Rompilla* because the state court did not apply the American Bar Association (ABA) Guidelines. Pet's Cert. at 13–14. But this Court has soundly rejected the notion that the ABA's guidelines are an "inexorable command with which all capital defense counsel must fully comply" to be constitutionally effective. *Bobby v. Van Hook*, 558 U.S. 4, 8 (2009) (per curiam) (internal quotation marks omitted). The state habeas

court could not have been unreasonable in not relying on guidelines this Court has explicitly declined to adopt.

Fourth, Batiste argues the state habeas court was unreasonable in concluding that Dr. Underhill's proffered opinion was cumulative of Dr. Krieger's trial testimony. Pet. Cert. at 16. But as discussed above, both Dr. Underhill and Dr. Krieger opined that Batiste was impulsive, and trial counsel elicited testimony from Dr. Krieger regarding possible sources that were out of Batiste's control (e.g., family dysfunction) for Batiste's behavior. 18 RR 80–81. That Dr. Underhill attributed Batiste's impulsivity to frontal lobe damage based on a tenuous, nebulous, and unproven connection to meningitis does not render his opinion meaningfully different from Dr. Krieger's trial testimony.

Fifth, Batiste argues that the state habeas court unreasonably applied *Strickland* by weighing aggravating and mitigating evidence because juries in Texas do not directly weigh aggravating factors against mitigating factors in reaching a punishment verdict. Pet. Cert. at 16–17. But aggravating evidence does not exist in a vacuum in Texas's sentencing scheme.[16] *Martinez v. Quarterman*, 481 F.3d 249, 259 (5th Cir. 2007) (concluding that the petitioner's

[16] In fact, the case on which Batiste relies to assert that aggravating evidence cannot be considered in the prejudice analysis under *Strickland* discussed the aggravating evidence and considered whether "the facts of the capital murder and the aggravating evidence originally presented by the State would clearly outweigh the totality of the applicant's mitigating evidence if a jury had the opportunity to evaluate it again." *Ex parte Gonzales*, 204 S.W.3d 391, 400 (Tex. Crim. App. 2006).

evidence of brain damage "was not so compelling, especially in light of the horrific facts of the crime, that the sentencer would have found a death sentence unwarranted"); *Vasquez v. Thaler*, 389 F. App'x 419, 428 (5th Cir. 2010) ("We have . . . repeatedly upheld the commonsense notion that the relative mix of mitigating and aggravating evidence must be reassessed when a court engages in a *Strickland* prejudice analysis.").

Lastly, Batiste argues that the state habeas court was unreasonable in failing to conduct a cumulative prejudice analysis with regard to his IATC claims. But Batiste raises only one allegation of IATC. Consequently, he has waived any argument regarding the alleged prejudice resulting from any other deficiency and there remains nothing to cumulate. Nonetheless, the district court considered whether the cumulative effect of the alleged deficiencies prejudiced Batiste. Pet'r's App'x 3 at 45–46.

As discussed above, the district court applied the appropriate analysis to Batiste's IATC claim. Batiste's several challenges to the state court's findings were raised in the courts below and were properly rejected. Consequently, his petition should be denied.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

ADRIENNE MCFARLAND
Deputy Attorney General
for Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

s/ Jefferson Clendenin
JEFFERSON CLENDENIN
Assistant Attorney General
Criminal Appeals Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711
Tel: (512) 936–1800
Fax: (512) 320–8132
e-mail: jay.clendenin@oag.texas.gov

*Counsel for Respondent*