No. 20-9556

IN THE
Supreme Court of the United States

JAMAAL HOWARD,

Petitioner,

v.

BOBBY LUMPKIN, 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

QUESTION PRESENTED

Petitioner Jamaal Howard was convicted and sentenced to death for the capital murder of Vicki Swartout, a Chevron convenience store clerk, during a robbery in Hardin County, Texas, on May 12, 2000. His state-habeas attorney raised claims of ineffective assistance of trial counsel (IATC) questioning the sufficiency of counsel's investigation of Howard's life history and mental health issues in terms of mitigation of punishment, competence to stand trial, and whether his *Miranda* waiver was knowing and intelligent. Finding that trial counsel's performance was not deficient and did not prejudice Howard's defense, the state courts denied all relief.

In federal court, Howard raised the same claims but supported them with additional evidence. The district court held that Howard failed to show that the state-court adjudication merited relief under 28 U.S.C. § 2254(d). Concluding that reasonable jurists could not debate that the state court reasonably applied federal law in rejecting Howard's claims and that Howard forfeited or waived several arguments on appeal, the Fifth Circuit denied a certificate of appealability (COA). Howard's petition for writ of certiorari raises the following issue:

> Where Howard fails to allege a circuit split, a direct conflict between the state court and this one, or even an issue that is particularly important, should the Court expend its time and limited resources to review any of three run-of-the-mill claims of ineffective assistance of counsel?

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BRIEF IN OPPOSITION

Respondent Director Bobby Lumpkin respectfully submits this brief in opposition to the petition for a writ of certiorari filed by Jamaal Howard.

STATEMENT OF THE CASE

I. Factual Background

A. Facts of the crime and Howard's confession

The Texas Court of Criminal Appeals (TCCA) discussed the factual background of the case as follows:

> [Howard] stole a gun from his grandfather the night before the murder and hid it. Despite his family's efforts to persuade him to turn over the gun, [Howard] refused. The following morning, [Howard] retrieved the gun and walked several blocks from his house to the Chevron store. After peering in the windows, he entered the store, went into the secured office area where the victim [Vicki Swartout] was sitting, cocked the gun, and shot [her] in the chest. [Howard] stole $114.00 from the cash register and reached over the dying victim to steal a carton of cigarettes before leaving. The offense was recorded on videotape. [Howard] denied committing the offense until he was told it was videotaped. He told the officer who took his statement that he was not sorry for committing the offense. . . .

Howard v. State, 153 S.W.3d 382, 383-84 (Tex. Crim. App. 2004).

Texas Ranger L.C. Wilson, the officer who took Howard's statement, advised Howard of his *Miranda* rights and noted that Howard appeared to understand his rights. ROA.4226. The *Miranda* rights were also included on the Voluntary Statement form that Howard initialed. ROA.5527. Howard's interrogation was videotaped and recorded orally. ROA.4226-27. During questioning, Howard "did not at all" appear to be confused or dazed and was "really quite at ease." ROA.4226.

Initially Howard did not admit to doing the crime, but after he was told there was a surveillance videotape, Howard admitted some knowledge of the offense. ROA.4227. He told Ranger Wilson that he had been "staying with his grandfather for some years and had woken up pretty early that morning and was watching some daytime soaps and game shows and stuff like that and then went and took his grandfather's pistol out from under a pillow and walked to the store and shot [the clerk] and came back." ROA.4230. Howard never gave a reason why he did it and expressed no remorse. ROA.4230.

Ranger Wilson and Howard sat side-by-side looking at the computer screen as the Ranger typed up Howard's statement. ROA.4229. Howard read the statement after it was typed. ROA.4229. Ranger Wilson also read the statement to Howard before it was printed. ROA.4229. According to Ranger Wilson, Howard "was very cognizant of what was going on." ROA.4229. When Howard was reviewing the printed out copy of his statement, he caught a misspelled word in the last paragraph. ROA.4233-34. The Ranger mistakenly typed "nobody else knew hat I did today," and Howard caught that the "w" was missing, wrote it before the word "hat," and initialed his handwritten correction. ROA.4234, 5528. Howard's confession was later admitted into evidence at trial without objection. ROA.4229, 5527-28.

B. Facts relevant to Howard's pretrial mental health evaluations

Howard was indicted for capital murder for intentionally killing Vicki Swartout during a robbery on May 12, 2000. ROA.1313. Attorney Tyrone C. Moncriffe entered his appearance as defense trial counsel on July 5, 2000. ROA.1315. Howard's

defense team included an investigator and a psychiatrist, Dr. Fred Fason. ROA.6152.

On February 5, 2001, Dr. Fason conducted a clinical evaluation of Howard. ROA.4744, 6163. After he had difficulty obtaining information from Howard and found his credibility "questionable," Dr. Fason recommended that counsel have Howard tested by a "Ph.D. Psychologist" who could administer the Wechsler Adult Intelligence Scale (WAIS) and other tests, the results of which were important "to both present competency to stand trial as well as exploring the possibilities of mitigation." ROA.6147. Based on his initial interview, Dr. Fason believed that Howard was competent, but that it was a close call, so he asked defense counsel to get psychological testing and obtain records for his review. ROA.5045.

On March 5, 2001, defense counsel moved for an independent examination of Howard's competence to stand trial. ROA.1689. The trial court granted the motion and appointed Dr. James Duncan, a Ph.D. psychologist, to examine Howard and provide a written medical narrative. ROA.1428, 1690-92.

Jury selection began on March 6, 2001. ROA.1696. Two days later, Dr. Duncan conducted a mental status examination of Howard, ROA.1436, and on March 9, 2001 submitted a written narrative in which he concluded that:

> Mr. Howard was able to provide a reasonably detailed narrative of his involvement in the alleged incident. He is aware of the specific charges against him and he expressed awareness of the possible penalties involved. *However, in the opinion of this examiner, Jamaal Howard's competency to stand trial at this time is questionable.* Mr. Howard's thought processes seem impaired and likely affecting his judgment and reasoning. Given the available history, his intellectual functioning appears to have deteriorated from a previous level and is now in a range

> that would be considered mildly impaired.[1] There is evidence of flattening or inappropriate affect. Although hallucinations were not acknowledged by Mr. Howard, this examiner observed him responding to apparently internal stimuli. Jail guards report similar behavior. His logic is unusual and at times unintelligible. Given Mr. Howard's age and the nature of the symptoms displayed, he may well be exhibiting an emerging thought disorder, possibly schizophrenia. An organic condition of unknown origin also can not be ruled out. Mr. Howard would appear to be in need of psychiatric treatment.

ROA.1437-38 (emphasis and footnote added).

During voir dire proceedings on March 15, 2001, defense counsel gave notice that Howard was changing his plea from "not guilty" to "not guilty by reason of insanity." ROA.2673. Defense counsel stated that he was reserving the plea until he saw the independent examiner's report and, after reviewing it, found it comported with the observations made by Dr. Fason and counsel regarding Howard's behavior. ROA.2671-72.

That same day, defense counsel requested a second independent medical examination as to Howard's competency to stand trial. *See* ROA.1434. The trial court granted the motion on March 15, 2001, and appointed psychiatrist Dr. G.E. "Ned" Groves. ROA.1434.

Dr. Groves conducted his evaluation of Howard on March 30, 2001 and issued a summary narrative on April 2, 2001. ROA.1448-51. In his narrative, Dr. Groves reported inter alia that Howard's cognitive examination "was notable for limited effort, if any." ROA.1450. He described that Howard was initially cooperative with

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[1] Dr. Duncan's narrative stated that Howard's intellectual functioning "was estimated to be in the borderline to mildly impaired range." ROA.1437. He arrived at this estimate by giving Howard several of the verbal subtests on the WAIS. ROA.5015.

answering some superficial questions, but then declined to answer most questions, and that Howard seemed "extremely disinterested" and "bored" with the process. ROA.1449-50. Dr. Groves ultimately concluded:

> In my opinion, Mr. Howard is competent to stand trial. I believe there would be sufficient secondary gain for him to feign psychiatric symptoms or to be minimally cooperative with attempts at developing a mental status profile. I do not believe that his past psychiatric history nor the current presentation significantly supports a diagnosis of a major Axis I condition otherwise, or a condition which would prohibit him from knowing right vs [sic] wrong or being able to participate in the judicial process.

ROA.1451.

C. Facts relevant to Howard's two trials on competency and subsequent conviction for capital murder

Evidence in the capital murder trial began on April 9, 2001. ROA.4099. The prosecution called eight witnesses who testified regarding the discovery of Ms. Swartout's body, the crime scene, the videotape showing Howard shooting Ms. Swartout and his taking money and cigarettes, the murder weapon, Howard's arrest, and his subsequent *Mirandized* statement. *See generally* ROA.4127-257. A ninth witness, a police dispatcher, testified regarding a 911 call made by Howard's grandfather, R.C. Kyles, on May 11, 2000, the day before the murder. ROA.4267-68. According to the dispatcher, Mr. Kyles reported that his grandson had a gun and shot it off inside the home, police officers were dispatched to the scene, and no other call came from Mr. Kyles that night. ROA.4269-79.

Trial was recessed on April 10, 2001, after testimony from the first defense-sponsored witness, Dr. James Duncan, in order to determine if Howard was

competent to proceed. ROA.4309-10.[2]

That day, Dr. Fred Fason reevaluated Howard and concluded that he should be considered not competent to stand trial. ROA.5053-54, 5755.[3] In a letter to defense counsel, Dr. Fason opined:

> Mr. Howard is suffering from a form of Schizophrenia that markedly impairs his ability to have a rational understanding of the charges against him and the consequences if convicted. Additionally, he does not possess the ability to cooperate with and communicate with his attorney in planning his defense, therefore he should be considered incompetent to stand trial. It is possible that after a trial on the newer atypical anti-psychotics that he could become competent to stand trial.

ROA.5756. Later that evening, Howard was evaluated by the State's expert, psychiatrist Dr. Edward Gripon. ROA.1525. Dr. Gripon reported that during his hour-and-a-half-long interview, Howard appeared to understand the questions posed, gave appropriate responsive answers including a detailed account of the day of the offense, and showed no evidence of any thought disorder. ROA.1525-28. Dr. Gripon opined that

> within a reasonable psychiatric probability, Jamaal Howard is competent to stand trial. He has a rational as well as factual understanding of his current legal difficulty and the legal process, and he possesses sufficient ability to communicate with his attorney with a reasonable degree of rational understanding.

ROA.1528 (reformatted). Dr. Gripon also concluded that Howard did not meet the

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[2] Dr. Duncan testified that Howard displayed symptoms of a thought disorder, possibly schizophrenia, and that Howard's competency to stand trial was questionable. ROA.4286-92, 4305. His testimony is described in more detail in Part I.D.2. below.

[3] By now, Dr. Fason had reviewed school records, medical records, and Dr. Duncan's report; interviewed Howard's mother and sister; and spoken with a doctor who treated Howard for Attention Deficit Hyperactivity Disorder (ADHD) as a teenager. *E.g.*, ROA.5027-30, 5035, 5037-40, 5053-54.

DSM-IV criteria for any major disorder, including "any form of Schizophrenia." ROA.1528.

A separate trial on competency began on April 11, 2001. ROA.4935. Howard presented four witnesses: (1) Tyre Thomas, a Hardin County Sheriff's Department jailer who was a childhood friend, ROA.4985-90; (2) Shirley Howard, Howard's mother, ROA.4990-99; (3) Dr. James Duncan, ROA.5000-23; and (4) Dr. Fred Fason, ROA.5024-57. The State called two psychiatrists, Drs. Ned Groves and Edward Gripon, ROA.5059-107, and Laura Elizondo, an educational diagnostician, ROA.5109-116. The competency trial ended in a mistrial on April 12, 2001 with the jury deadlocked. ROA.5158-59.

A second competency trial began on April 16, 2001. ROA.5165. Howard called (1) Dr. James Duncan, ROA.5269-305; (2) Shirley Howard, ROA.5306-24; (3) Joann Ferrell, Director of Special Services for Silsbee Independent School District, ROA.5334-39; and (4) Sandra Johnson, a correctional officer who had known Howard all of his life. ROA.5340-49. The State called Dr. Ned Groves, ROA.5351-95, and Captain Coy Collins, an administrator at the Hardin County Jail, ROA.5396-411. In rebuttal, Howard called (1) Donna Johnson, a custodian of medical records, ROA.5413-15; (2) Captain Coy Collins, ROA.5418-21; (3) Tyre Thomas (who testified during the first competency trial), ROA.5422-28; and (4) Linda Lacy, a family friend who described her observations of Howard's unusual behavior and changed personality over time, ROA.5429-33. The trial concluded on April 17, 2001, with the jury finding Howard competent to proceed. ROA.5465-66.

Trial on the merits resumed on April 18, 2001. ROA.4317. In addition to Dr. Duncan's testimony which the jury previously heard, Howard presented testimony from ten lay witnesses including family members, friends, and teachers to support an insanity defense, *see generally* ROA.4327-40, 4351-89, 4398-418, 4431-35, and the prosecution called psychiatrist Dr. Edward Gripon in rebuttal, ROA.4441-66.[4]

Howard's jury was instructed and charged on the affirmative defense of insanity. ROA.1536-37. The jury rejected the defense and on April 20, 2001, found Howard guilty of capital murder. ROA.1540, 1574.

D. Facts relevant to punishment

1. The State's case-in-chief

The TCCA gave the following summary of the evidence presented by the State:

> At the punishment stage of trial, the State presented evidence that [Howard] demonstrated a disregard for authority and school rules despite the continued efforts of his mother and educators. During one incident, [Howard] punched a pregnant teacher in the chest with his fist when she asked him to return to his seat. When [Howard] was assigned to an alternative school, he refused to comply with its rules and standards, and was defiant and disruptive. The State also presented evidence of [Howard's] possession of controlled substances, his fighting with police officers and resisting arrest, his committing several burglaries as a juvenile, and his fighting with other inmates.

Howard, 153 S.W.3d at 384.

2. Howard's case for mitigation

The district court summarized the evidence presented by Howard during both stages of trial from nineteen lay witnesses and two experts regarding his background

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[4] Testimony provided by these witnesses is described in more detail in the Statement of the Case, Parts I.D.2. and 3. below.

and mental health history as follows:

a. Testimony of family members.

(1) Howard's background and mental status.

Shirley Howard, Howard's mother, testified at both stages of trial. ROA.4398-4429, 4787-94. During the guilt/innocence stage, his mother testified that Howard has always had mental problems and that she first began noticing some problems when he was in the 3rd grade. ROA.4399. Howard was diagnosed with ADHD in the 5th grade. ROA.4399. He started taking medication for ADHD in the 6th grade, and it calmed him down a bit. ROA.4400. Ms. Howard testified that Howard had problems in class at times because of his ADHD. ROA.4400. When Howard was in the 7th or 8th grade, they began to see Dr. Laine who diagnosed Howard with depression. ROA.4400. Dr. Laine prescribed Pamelor, but later switched Howard to Prozac. ROA.4401. Ms. Howard testified that Howard took the medication and his behavior got better. ROA.4401. Howard stopped seeing Dr. Laine in October or November of 1996 after Dr. Laine moved from the area. ROA.4401. His mother made an appointment for Howard with a psychiatrist in Beaumont, Dr. Ned Groves, but Howard would not go. ROA.4401-02. When Howard was sixteen years old, his mother learned that Howard was getting more disruptive in his afternoon classes and that he was not taking his 12:00 p.m. medication. ROA.4402. She tried to have Howard hospitalized in order to get him back on his medication, but Howard refused to sign the papers to commit himself. ROA.4402. Ms. Howard stated that she was told Howard had to voluntarily admit himself to the hospital or else she had to go to a county judge and say Howard was threatening to harm himself or others. ROA.4403.

Ms. Howard further testified that as time passed, her son's mental condition worsened. ROA.4403. When the family would be watching television, Howard would spontaneously laugh out loud for no apparent reason and did so on other occasions. ROA.4403-04. Howard would sit and rock, but would bend his whole body like an autistic child. ROA.4404. Ms. Howard stated that the biggest difference she noticed was the decline in Howard's personal hygiene. ROA.4405. She described Howard as a very clean and neat child who starched and ironed his jeans or shorts every day. ROA.4404. More recently, he wore an old wool hat on his head in summertime, did not change his clothes or wash his clothes for days, and he did not take baths. ROA.4404. The family had to repeatedly ask Howard to take a bath until he eventually did so.

ROA.4404. Ms. Howard testified that her son went from always willing to talk with her to where he only answered "yes" or "no," and even that had stopped. ROA.4405. When Howard was placed in the homebound program, he went to live with his grandfather because he could make sure that Howard got up in the morning and took his medications. ROA.4405-06. Howard was also there to help his grandfather, who is legally blind and has arthritis. ROA.4406.

At the punishment stage, Shirley Howard identified pictures of her son as he was growing up. ROA.4787-90 [DX-2 to DX-6: ROA. 5645-46, 5648-49, 5651]. She also identified five sports trophies of Howard's when he made All Stars in baseball and basketball. ROA.4790-91 [DX-7 to DX-11: ROA.5652-56]. Ms. Howard additionally testified about a fight Howard got into with another inmate while she was visiting him at jail on January 4, 2001. ROA.4791-93. Howard had been looking at his mother during the visitation, but then looked away and started mumbling something. ROA.4792. Ms. Howard asked what he had said, but Howard did not respond and turned away. ROA.4792. She heard Howard saying, "What did you say? I told you to leave my stuff alone," then saw him jump up, go to the far end of the visitation room, stand over one of the other inmates, and heard him keep saying, "What did you say to me?" ROA.4792. By the time the jailer came, Howard had hit the other inmate. ROA.4792. Ms. Howard testified that there have been times when she is speaking to Howard but he does not respond and looks past her. ROA.4792-93. Finally, Ms. Howard testified that she told school officials that Howard told her on one occasion that he heard voices. ROA.4793.

Sheanna Howard, Howard's sixteen-year-old sister, testified at both stages of trial. ROA.4366-75, 4785-86. During the guilt/innocence stage, Miss Howard testified that her brother had always had problems mentally. ROA.4367. On some occasions, he did not take baths and that was not like him to do so. ROA.4367. She agreed that Howard would go for long periods of time without bathing and that her family would have to tell him to take a bath. ROA.4367. Miss Howard denied noticing anything unusual about how Howard would eat. ROA.4368. At the punishment stage, [she] testified that she knows her brother is charged with a very serious offense, the jury could kill him or give him life, she loves her brother, and she prays for both families. ROA.4785-86.

Pamela Fulton, Howard's cousin, testified at the guilt/innocence stage that she has lived in Silsbee, Texas, all her life. ROA.4351-52. She stated that she has seen Howard's different mental states over his life and noticed recently that Howard would sit alone, talking and laughing

to himself. ROA.4352. Ms. Fulton testified that Howard would do this at her house, at his grandfather's house, and standing outside on the corner. ROA.4352. According to Ms. Fulton,. Howard's behavior had started to concern the family. ROA.4352.

Jerry Howard, Jr., Howard's older brother, testified at the guilt/innocence stage that he played basketball, baseball, and football; that Howard played the same sports he did; and that Howard tried to follow him sometimes and do the same things he did. ROA.4376. He agreed that his brother had always had some sort of problem, even when he was really young. ROA.4376-77. Howard was on medication for a long time, sometimes their mother had to force Howard to take his medication, and she gave Howard's medication to the school nurse to make him take it. ROA.4377. He recalled that Howard sometimes wore the same clothes for weeks and would not wash them, and that he gave Howard clothes to wear but Howard would not put them on. ROA.4377. Jerry Howard testified that he would sometimes drive around with Howard and talk, but Howard would just sit there and not say anything in response. ROA.4377-78. He agreed that the family was starting to become concerned about Howard's behavior. ROA.4378.

R. C. Kyles, Howard's eighty-four-year-old grandfather, testified at the guilt/innocence stage that he has eleven grandchildren and loves them all, but is the closest to Howard. ROA.4431-32. He said he felt that way because Howard never could explain himself or defend himself, and other kids would blame Howard for things he did not do. ROA.4432. Mr. Howard testified that Howard lived with him. ROA.4432. He stated that Howard had a small room air conditioner and two oscillating fans and sometimes would have them all turned on, but then Howard would also turn the big heater on and have it blasting at the same time. ROA.4433-34. If Mr. Kyles was woken up by loud music on Howard's record player, he would go into Howard's room to turn the music down and would cut[]off the heater. ROA.4434.

(2) Howard's behavior the night before the capital crime.

Several of Howard's family members testified regarding his unusual behavior on May 11, 2000, the night before the capital murder, including his mother[,] ROA.4406-18, grandfather[,] ROA.4434-37, brother Jerry[,] ROA.4378-88, sister Sheanna[,] ROA.4368-71, and cousin Pamela Fulton[,] ROA.4352-59.

Generally, these individuals testified that Howard's grandfather, Mr. Kyles, called 911 to report that Howard had taken one of Mr. Kyles' guns and fired it inside his residence. ROA.4368, 4408, 4433. Mr. Kyles testified that he was afraid of his grandson that night and that Howard's skin color had changed, his eyes were big and white, and his eyes had rolled up into the back of his head. ROA.4433. When the police arrived at Mr. Kyles' home, Howard was not present. ROA.4368. Howard's family did not want Howard arrested, but wanted help finding him because they were concerned that he had a gun. ROA.4410. The police officers left, but said they would look for Howard while they were on patrol. ROA.4409. Howard came back to the residence after the police had gone, looking wild eyed. ROA.4368, 4411-12. Family members tried to keep Howard distracted while they called the police. ROA.4369, 4411-15. No officer appeared and the family did not call the police again. ROA.4370, 4415.

Howard's brother, Jerry, testified that when he arrived at their grandfather's house, he talked with Howard to try to calm him down but Howard was "in his own world." ROA.4380-82. Shirley Howard told Jerry to take Howard away from the house because their grandfather was afraid. ROA.4382. Pamela Fulton testified that Howard looked filthy and kept scratching himself, so she suggested they take him to her house so he could take a bath. ROA.4357. Jerry got some clean clothes for Howard and told him to go take a bath, but Howard just stood there so Jerry turned on the water for him. ROA.4384. When Jerry went to check on Howard's progress, he found him standing in the shower fully clothed, with the water running, and acting like he was rubbing himself with soap. ROA.4358, 4386. Jerry told his brother to get cleaned up because he was going to get a girl over there for him, and Howard agreed to do so. ROA.4387-88. Jerry ended up taking Howard and a cousin out driving until about 3:00 a.m., then dropped them both off at the cousin's house. ROA.4394. Howard's mother testified that the following day, she was planning on talking with a judge to have Howard committed to a mental hospital because she felt he was a danger to himself and others. ROA.4417-18.

b. Testimony of friends and peers.

Lisa Sanchez, Howard's 4th grade teacher, testified for the defense at both stages of trial. ROA.4327-30, 4680-90. During the guilt/innocence stage, Ms. Sanchez testified that when Howard was her student, she taught a self-contained classroom, which meant all subjects, all day long. ROA.4329. Ms. Sanchez testified that she knows Howard very well and had known him and his mother before Howard

ever became her student because her husband coached him in Little League the year before. ROA.4330. Howard sometimes came to their home after school and played with their pets. ROA.4330. Ms. Sanchez described Howard as "a very outgoing child, very busy, [who] had difficulty staying in his seat and completing his work. Mostly a happy-go-lucky child, but sometimes easily agitated." ROA.4330. Howard started taking medication for ADHD when he was in her class, and she saw his mental state both on and off medication. ROA.4330.

At the punishment stage, Ms. Sanchez testified that she taught a transition classroom where it was her job to work with students in math and reading to help bring them up to grade level. ROA.4681. Howard was in her class because he had some learning difficulties, was below grade level, and had problems staying in his seat and getting his work done. ROA.4681-82. Ms. Sanchez testified that Howard did not particularly like math and it took him a while to get his work done. ROA.4683. As a reward, she frequently let Howard sit underneath the table beside her desk where it was quiet and he could finish his work. ROA.4683. Ms. Sanchez further testified that Howard would come to their home and play with their Dalmatians, that he loved the dogs and drew pictures of himself and the dogs, and his pictures were hung up on the walls at school. ROA.4684.

Michael Sanchez, Lisa Sanchez's husband, also testified at both stages of trial. ROA.4331-33, 4675-79. At the guilt/innocence stage, Mr. Sanchez testified that he was Howard's Little League baseball coach when Howard played on the team for eight year olds. ROA.4329. By his account, Howard was a very good athlete and they played him everywhere, from outfield to infield to pitcher. ROA.4332. Mr. Sanchez testified that when Howard was on his team, it was prior to his taking medication. ROA.4332. Howard had a hard time focusing on the repetitive drills like batting practice, but he was very eager and very excited to play. ROA.4333. The coaches tried to make it as fun as possible but also wanted everyone to learn, and they had lots of hard times keeping Howard on task. ROA.4333. Mr. Sanchez testified that after Howard was medicated, his behavior settled down. ROA.4333. He witnessed the positive change in Howard's behavior first hand when he accompanied his wife's class on a field trip the following year. *See* ROA.4333.

During the punishment stage, Mr. Sanchez testified that he first met Howard when he was coaching Howard's older brother, Jerry, and Howard would come out to the practices and ball games to watch his brother play. ROA.4676. He described Howard as "very rambunctious,

very excitable" and that he seemed to have a lot of nervous energy. ROA.4677. Mr. Sanchez testified that he and Howard got along pretty well, that Howard came to the Sanchezes' home a few times, and that Howard was respectful. ROA.4678.

Joel Neely, a civil structural engineer at DuPont, also testified for the defense at both stages of trial. ROA 4334-37, 4767-71. During the guilt/innocence stage, Mr. Neely stated that he coached Little League baseball, softball, and basketball in Silsbee. ROA.4335. He remembered Howard as probably one of the top three pitchers on his team and described Howard as a "game winner" and a "real good athlete." ROA.4336. Mr. Neely testified that most of the time, Howard was just one of the regular kids who liked to play baseball and have fun. ROA.4336-37. However, there was occasions in practice when he could tell that Howard was not really motivated and was "not right" that day. ROA.4337. Mr. Neely agreed that Howard's behavior was stabilized on medication, but when Howard did not take them, his behavior became erratic. ROA.4337.

At punishment, Mr. Neely testified that Howard played on his Rangers team when he was ten or eleven years old. ROA.4678. Mr. Neely had seen Howard play, knew he was a good athlete, and wanted him on his team. ROA.4769. He swapped one of his team's players for Howard's older brother Jerry, who was a catcher, knowing that he would get Howard as a pitcher in a year or two because brothers get to play on the same team. ROA.4769. Mr. Neely testified that the Howard brothers were always at practice and always had their gear, and he never had to worry about them being late. ROA.4770. After all these years, Mr. Neely still had fond memories of Howard. ROA.4770.

Lola Thomas, a nurse manager at Christus St. Elizabeth Hospital, testified at the guilt/innocence stage. ROA.4338. She stated that she had known Howard all his life and noticed his behavior changing over the last four or five years. ROA.4339. Ms. Thomas described Howard as having become very withdrawn and isolated, and that he separated himself from his friends. ROA.4340. Based on her training and experience as a nurse, she believed that Howard's behaviors were symptomatic of someone with mental problems. ROA.4340.

Milton Young testified at the guilt/innocence stage that he had lived in Silsbee for the past twenty years, he knows the Howard family, and has known Howard since he was a little boy. ROA.4361-62. About two weeks before the capital crime, Mr. Young saw Howard walk down

the road and just stand there at the corner staring at folks. ROA.4363. Mr. Young figured that Howard "had a little problem," so he talked to the Chief of Police because he figured that Howard needed some help. ROA.4363-64.

Deputy Sherry Harrison, a jailer with [the] Hardin County Sheriff's Department, testified at the punishment stage that Howard was the type of inmate who would follow directions, Howard followed her directions, and she never had any personal problems with him. ROA.4669-70.

Deputy Tyre Thomas, a jailer with the Hardin County Sheriff's Department, testified at the punishment stage that he went to church with Howard when they were young, and he played baseball with Howard's older brother, Jerry. ROA.4671-72. The deputy saw Howard at the jail and had contact with him. ROA.4672. Deputy Thomas testified that Howard acted differently from how he did years ago—he now talks to himself, has mood swings, and does not take a bath or brush his teeth unless he is told to do so. ROA.4672. He also testified that he had not had any problems with Howard like fighting at the jail. ROA.4674.

William Bass testified at the punishment stage that he works for the Westvaco paper mill in Evadale. Mr. Bass testified that he was tired because he had been up for about twenty-four hours and, despite being tired, he wanted to come to court to make a statement for Howard. ROA.4772-73. Mr. Bass knew Howard from Little Dribblers, the Little League basketball team. ROA.4773. He stated that he has four sons and the next-to-the-youngest son was Howard's classmate and they played basketball together. ROA.4774. According to Mr. Bass, when Howard got the basketball in his hands, everyone knew he was going to score and that is how the team won games. ROA.4773. Mr. Bass was not a coach but just a parent who watched the kids play. ROA.4774. Mr. Bass stated that he had sympathy for the victim's family and wished he could turn back the hands of time but also felt sorry for both the victim and for Howard. ROA.4774.

Tonya Moffett, Howard's first cousin, testified at the punishment stage that she works at Helena Laboratories in Beaumont. ROA.4775. She stated that in February 1989, Howard was a junior groomsman in her wedding and that he had always treated her with courtesy. ROA.4776. Ms. Moffett understood that Howard's jury could give him the death penalty and stated that both families were in her prayers. ROA.4776.

Sandra Johnson testified at punishment that she works as a correctional officer at the Stiles Unit in Beaumont, Howard's mother and grandmother are her neighbors, and she has known Howard ever since his mother brought him home from the hospital as a baby. ROA.4777-78. She understood the jury could give Howard life or death, and had sympathy for the other family. ROA.4778.

Denise Young testified at the punishment stage that she works in office administration for a Home Improvement warehouse. ROA.4779. She stated that she has known Howard since he was about five years old. ROA.4780. She understood the jury could give Howard life or death, she had sympathy for the victim's family, and said they were in her prayers. ROA.4780.

Iby G. Young testified at punishment that she was fourteen years old and a "pretty good student" at Silsbee High School. ROA.4781. Her mother is Denise Young, the witness who testified just before her. ROA.4781. Miss Young stated that she knew Howard "because he used to come around my house and visit a lot and he used to come play with me and my brother." ROA.4782. She testified that Howard told her to "always try my best and succeed at whatever I do" and "don't let anyone tell me that I can't do or be anything I want to be in life." ROA.4782. Miss Young understood that the jury could give Howard life or death, and would pray for both families. ROA.4782.

Keesha McKinney testified at the punishment stage that she is the twenty-two-year-old daughter of Sandra Johnson, who testified earlier in the penalty phase. ROA.4783-84. She stated that she has known Howard since childhood and they grew up together. ROA.4784. Ms. McKinney testified that they played everything together, including kickball, baseball, and volleyball. ROA.4784. Her aunt had a field right next to her house and all the neighborhood kids would come down there and play. ROA.4784. Ms. McKinney always liked having Howard on her team because he could hit good, kick good, and they would win the game when Howard came to bat. ROA.4784. She understood Howard could get life or death, and she prayed for both families. ROA.4784-85.

c. Testimony of expert witnesses.

Dr. James Duncan, clinical psychologist, testified for the defense at the guilt/innocence stage. ROA.4281-4308.[] He was appointed by the trial court to conduct a mental status examination of Howard. ROA.4288. On March 8, 2001, Dr. Duncan interviewed Howard for an hour-and-a-half to two hours at the Hardin County Jail and assessed his

mental functioning, emotional functioning, intellectual functioning, concentration, and memory. ROA.4283-84. He also provided a written report of his evaluation. [DX-1: ROA.5642-44]. Dr. Duncan found Howard's level of functioning to be inconsistent, i.e., he sometimes gave coherent responses but other times gave unintelligible or inappropriate responses. ROA.4286-87. He testified that Howard would suddenly smile or chuckle when there was no obvious reason for the response. ROA.4287. Dr. Duncan thought Howard might have been responding to an internal stimulus, as if he heard voices. ROA.4288. He also expressed his concern about Howard's ability to maintain concentration and found evidence of flattening or inappropriate affect. ROA.4288. Dr. Duncan's intellectual assessment of Howard was that he operates at a borderline to mildly impaired level of functioning. ROA.4289. In his opinion, Howard had some deterioration in intellectual functioning which could be due to an organic condition like a blow to the head or a brain tumor, or else a biological condition like schizophrenia which usually occurs in late teens and early twenties. ROA.4289-90. Given Howard's age and the nature of symptoms displayed, Dr. Duncan thought Howard may well be exhibiting an emerging thought disorder, possibly schizophrenia. ROA.4290-92. Dr. Duncan testified that Howard appeared to be in need of psychiatric treatment, and that he had questions about Howard's competency to stand trial. ROA.4292, 4304-05. He also spoke to one of the jailers who had observed Howard and learned that his observations of Howard's behavior were consistent with his own. ROA.4303.

Dr. Fred Fason, a psychiatrist, testified at punishment regarding his mental health evaluation of Howard. ROA.4707-66. Dr. Fason interviewed Howard twice, the first time in February 2001. ROA.4717. When he began to administer one of the psychological tests, Howard did not know some of the words in the first few questions. ROA.4719. Dr. Fason testified that this caused him to conclude that Howard could not read at the 6th grade level and questioned whether he was intellectually disabled. ROA.4719-20.

After reviewing Howard's school records, Dr. Fason discovered that Howard had started out as a "really bright student." ROA.4721. Howard was in the 90% in math in 2nd grade, but had dropped to the 30% in the 5th grade. ROA.4721. Dr. Fason testified that "it was as if some malignant process started affecting [Howard's] brain because he went downhill from there." ROA.4722. Dr. Fason theorized that Howard's declining performance in school was due to the onset of schizophrenia. ROA.4724. He reviewed Dr. Duncan's report and testing materials, and testified that some of the behaviors observed by Dr. Duncan were characteristic of schizophrenic disorder. ROA.4723. These

included poverty of thought, inappropriateness of affect, and loose associations when Howard was pressed on questioning. ROA.4723-24, 4727-30. Dr. Fason believed that Howard's diagnoses of ADHD and depression during adolescence were more consistent with schizo-affective schizophrenia, and that Howard possibly should have been hospitalized. ROA.4730-31. Dr. Fason called Howard's physician, Dr. Laine, in Florida, conferred with him about the possibility of schizophrenia, and reported that Dr. Laine thought, in retrospect, that Howard might have had a schizo-affective disorder or prodromal schizophrenia. ROA.4725, 4733.

Dr. Fason did not agree with testimony provided at the guilt/innocence stage by the State's expert, Dr. Edward Gripon, that Howard's behaviors were indicative of antisocial personality disorder and instead believed Howard's lack of caring was more consistent with depression. ROA.4754, 4762-63. Dr. Fason also testified about medicines used for treating patients with schizophrenia and stated that newer, atypical anti-psychotic medications are becoming available. ROA.4757.

Howard, 2019 WL 4573640, at *6-12 (section numbering and citations changed).

3. The State's case in rebuttal

The district court summarized the State's evidence as follows:

Dr. Edward Gripon, a psychiatrist with twenty-six years[']
experience, testified for the State during its case in rebuttal at both stages of trial. ROA.4441-66, 4795-814. In addition to giving his opinion that Howard was not insane at the time of the crime, Dr. Gripon testified at the guilt/innocence stage that many of the symptoms or behaviors attributed to Howard—such as having wild eyes, flat affect, depression, talking to himself, poor hygiene, and laughing inappropriately—are symptoms of using crack cocaine. ROA.4448-53. Dr. Gripon also found no evidence of Howard having a substantial mental illness or thought disorder when he clinically evaluated Howard in April 2001. ROA.4453. Dr. Gripon stated that Howard's records contained one reference to Howard being clinically depressed five years ago, but Dr. Gripon did not find evidence of clinical depression when he evaluated Howard prior to trial. ROA.4455-56.

During the punishment stage, Dr. Gripon testified for the State that Howard was not suffering from schizophrenia, but instead has antisocial personality disorder. ROA.4798-805. He reported that Howard was diagnosed with ADHD in 1993 and treated until 1996; that

Howard's behavior improved and his grades were satisfactory when he took medication; and that when Howard was noncompliant, his grades declined and his behavior deteriorated. ROA.4797-98. Based on his review of Howard's school records, Dr. Gripon did not find anything to indicate that Howard was suffering from the early signs of schizophrenia. ROA.4798. Dr. Gripon explained that in making a mental health diagnosis in 2000, such diagnosis must be based on the DSM-IV criteria—not psychological literature like that relied on by Dr. Fason. ROA.4804. To be diagnosed with schizophrenia under the DSM-IV, a person must have two of the four criteria and must exhibit those behaviors consistently over a thirty-day period. ROA.4804. Dr. Gripon testified that Howard does not suffer from schizophrenia because, although he does have flat affect, he does not exhibit any of the other three DSM-IV criteria.[5] ROA.4804.

Ken Thompson, a criminal investigator with the special prison prosecution unit, testified regarding the different types of prison settings for persons convicted of capital murder versus those convicted of murder and receiving a life sentence. ROA.4814-18, 4821-22. He also testified about prison gangs such as the Crips, how they recruit members, and the types of illegal activities that gangs are involved in within prison. ROA.4818-21. Finally, the State presented victim impact testimony from Joann Swartout, the victim's mother, and Jennifer Buckley, a niece. ROA.4825-34.

At the close of the punishment hearing, the jury answered the special issues on future dangerousness and mitigation in a manner which required the trial court to assess Howard's punishment at death by lethal injection. ROA.4901-03; ROA.1545-49, 1573-76.

Howard, 2019 WL 4573640, at *12-13 (record cites changed to ROA cites).

II. Procedural Background

After a Hardin County, Texas, jury deemed Howard competent to stand trial, another jury convicted him of the capital murder of Vicki Swartout. ROA.1540, 1574.

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[5] According to the DSM-IV, the criteria for schizophrenia is two (or more) of the following: (1) delusions, (2) hallucinations, (3) disorganized speech (e.g., frequent derailment or incoherence), (4) grossly disorganized or catatonic behavior, or (5) negative symptoms (i.e., affective flattening, alogia (poverty of speech), or avolition (lack of motivation) each present for a significant portion of time during a 1-month period[.]

Based on the jury's answers to the special sentencing issues, the trial court sentenced Howard to death on April 25, 2001. ROA.1550-54.

The TCCA affirmed Howard's conviction and sentence on direct appeal. *Howard*, 153 S.W. at 389, and this Court denied Howard's petition for a writ of certiorari from that appeal. *Howard v. Texas*, 546 U.S. 1214 (2006) (Mem.).

While his direct appeal was proceeding, Howard filed a state habeas application raising twenty-two claims. ROA.6043-204. Three IATC claims relevant here were predicated on a single supposed shortcoming—that trial counsel was deficient in investigating Howard's background, which prevented counsel from discovering mental health related evidence. In Claim 5(A), Howard alleged that, although counsel investigated and determined that Howard had mental deficiencies and discussed Howard's ADHD and potential schizophrenia, counsel did not use the issues to challenge the voluntariness of Howard's custodial statement. ROA.6070-71.[6] In Claim 5(B)(2), Howard alleged that trial counsel failed to "handle mental competency issues appropriately" by not developing "available evidence of mental illness." ROA.6071-72. He argued that counsel's investigation "must not have included reviewing jail records"—specifically, a report from Dr. Glen Guillet "which

[6] Howard's state habeas application included a separate claim alleging that he is intellectually disabled and his execution would violate *Atkins v. Virginia*, 536 U.S. 304 (2002). ROA.6047-57. His evidence consisted of Dr. Fason's letter recommending that counsel have a psychologist administer the WAIS, ROA.6147, and Dr. Duncan's estimate of Howard's I.Q., *see* footnote 1 *supra*. The claim was denied on the merits, ROA.6017-18, 6296-97, then abandoned on federal habeas review, *e.g.* ROA.427-28, 434, 443, and is not before this Court.

would have supported a theory of mental illness,"[7] and an initial custody assessment that noted a "mental deficiency" on the day of Howard's arrest.[8] ROA.6072 (citing ROA.6169-72, 6174-77). Finally, in Claim 16(B), Howard alleged that counsel failed to investigate and present "mental health mitigating evidence" consisting of jail records which showed that he suffered a head injury in 1997,[9] and failed to develop this evidence by medical records and neurological examination. ROA.6116 (citing ROA.6149-50).

The habeas trial court adopted the State's proposed findings of fact and conclusions of law recommending that relief be denied. ROA.6313, 6295-6313. For the IATC claims, the state court found that trial counsel presented evidence to the jury regarding Howard's mental state through testimony of experts and non-experts during two trials on competency and during the guilt/innocence and punishment stages of trial, and concluded that Howard failed to prove both deficient performance

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[7] This evidence consisted of a "Physician's Certificate of Medical Examination for Mental Illness" that was completed on May 15, 2000, three days after the capital crime. ROA.616-72. In it, Dr. Guillet noted that Howard had a "scalp wound" that was several days old, but that Howard was "mentally intact—aware of robbery details and shooting of the cl[erk]." ROA.6169. A mental status examination also revealed that Howard was "Oriented as to time [and] place," "Aware of having premeditatedly robbed a store," and "Aware of having shot the clerk." ROA.6171.

[8] An "Initial Custody Assessment" of Howard was made on May 12, 2000. ROA.6174. The records included a section entitled "Special Management Concerns," where "mental deficiency" was circled along with "escape threat," "serious violence threat," and "substance abuse." ROA.6175.

[9] A Medical Information Form from 1997 stated: "Gunshot wound to the back of the head. Rcvd treatment prior to being brought to jail @ SDH. Inmate stated that he isn't on any medication other than pain medication, but does not have it with him." ROA.6149. A second page had "YES" checked beside "Lesions" and noted "gunshot to head." ROA.6150. The form also asked, "In your opinion is the prisoner capable of exercising sound judgment in answering the [above] questions," and the examiner checked "YES." ROA.6150.

and prejudice. *See* ROA.6300-02. Based on the findings and conclusions and its "own review," the TCCA denied habeas corpus relief. *Ex parte Howard*, No. WR-77,907-01, 2012 WL 6200688, at *1 (Tex. Crim. App. Dec. 12, 2012).

Howard petitioned for federal habeas on December 12, 2013, raising nine claims including one alleging intellectual disability under *Atkins*. ROA.109-72. The district court authorized funding for Howard to obtain the assistance of a mitigation specialist and three mental health experts. *See* ROA.1033. In 2017, Howard informed the district court that after additional testing and procedures, his experts determined that he "does not have Intellectual Disability." ROA.428; *see* ROA.427, 434, 443.

On September 25, 2017, Howard filed an amended habeas petition abandoning his *Atkins* claim and raising five grounds for relief. ROA.445-771. As relevant here, Howard's first claim asserted that trial counsel provided ineffective assistance during the punishment phase by allegedly failing to "conduct a reasonable investigation of [Howard's] life history and to have a mental health evaluation conducted in light of that history." ROA.476. Howard's second claim incorporated the facts contained in his first IATC claim, ROA.476, and asserted that counsel was ineffective for failing to adequately investigate his "psychosocial history" and "mental condition" regarding (a) "his competence to stand trial," . . . and (c) "whether his waiver of *Miranda* rights and subsequent confession were knowing and intelligent." ROA.525. Except for medical and school records that were already in the trial record, ROA.558-623, 654-86, Howard supported his IATC claims with eight declarations and an expert report never presented in state court. ROA.545-57, 624-53, 687-771.

On September 20, 2019, the district court issued a Memorandum Opinion and Order denying habeas corpus relief and denying a COA. *Howard v. Director*, No. 1:13-cv-256, 2019 WL 4573640 (E.D. Tex. Sept. 20, 2019); Pet. Appx. 2. Regarding the instant IATC claims, the district court held that Howard failed to show that the state court adjudications unreasonably applied federal law under § 2254(d). *Howard*, 2019 WL 4573640, at *26-38, *45-48, *53-55. Final judgment issued on September 25, 2017. ROA.1179.

Howard sought a COA in the Fifth Circuit on his IATC claims. Mot.COA.9, 42-45, 46-54.[10] The Fifth Circuit declined to issue one. *Howard v. Davis*, 959 F.3d 168 (5th Cir. 2020); Pet. Appx. 1. He now seeks a writ of certiorari claiming that the COA denial was in error. Pet. Cert. 14-21. The Director's response follows.

REASONS FOR DENYING THE WRIT

I. Howard Provides No Compelling Reason to Grant Certiorari.

At the outset, Howard fails to provide justification for granting a writ of certiorari—no allegation of a circuit split, a direct conflict between the state court and this one, or even an issue that is particularly important. *See* Sup. Ct. R. 10(a)-(c). Instead, he contends the Fifth Circuit "err[ed] in considering the totality of three different trials" and erred in "excusing the District Court's erroneous conclusion regarding the proper standard" for reviewing IATC claims. Pet. Cert. 2. That, however, is hardly an *adequate* justification for expending limited judicial resources to review run-of-the-mill IATC claims, especially when many of Howard's current

[10] Howard also appealed the district court's denial of an evidentiary hearing. Mot.COA.45-46. That issue is not before this Court.

arguments were held to have been forfeited or waived on appeal. *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."). And that is because "[e]rror correction is 'outside the mainstream of the Court's functions.'" *Cavazos v. Smith*, 565 U.S. 1, 11 (2011) (Ginsburg, J.) (quoting Eugene Gressman et al., *Supreme Court Practice* 351 (9th ed. 2007)). Howard's petition should be denied for this reason alone. *Cf.* Sup. Ct. R. 14(h) (a petition for writ of certiorari should contain a "concise argument *amplifying* the reasons relied on for allowance of the writ" (emphasis added)).

II. The Fifth Circuit Properly Denied a COA on Howard's IATC Claim Alleging Failure to Investigate, Develop, and Present Mitigating Evidence.

Howard argues that his attorney was ineffective at the punishment stage (1) for not hiring or seeking appointment of an additional expert to examine him and gather a life history for mitigation purposes, (2) for failing to discover and develop evidence of a head injury, and (3) for not presenting more witnesses and questioning them better. Cert. Pet. 15, 16-17, 19. In turn, he asserts that he was prejudiced by this deficient performance because a complete history of his mental illness and life history was not presented that would likely have resulted in a life sentence. *Id.* at 15. Howard contends the Fifth Circuit erred in reviewing his claim, and that a writ of certiorari should be granted and the case remanded for further proceedings. *Id.* at 22.

The Court should deny Howard's petition because he fails to raise a cert-worthy issue concerning the Fifth Circuit's denial of a COA. To obtain a COA, an inmate

must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Because the district court denied Howard's IATC claims on the merits, he "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), or that "the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack*).

The familiar standard of *Strickland v. Washington*, 466 U.S. 668 (1984), governs IATC claims. To prove ineffectiveness, an inmate must establish that trial counsel's performance was deficient and that such deficiency prejudiced the defense. *Id.* at 687. "[S]crutiny of counsel's performance is 'highly deferential,'[11] and 'doubly'[12] so when the ineffective-assistance claim is raised on federal review of a state court decision that rejected the *Strickland* claim on the merits." *Hummel v. Davis*, 908 F.3d 987, 991 (5th Cir. 2018). As the Fifth Circuit correctly recognized, the district court's job was to determine whether the state adjudications "were contrary to, or unreasonably applied, clearly established federal law" as determined by this Court, "or unreasonably determined the facts." *Howard*, 959 F.3d at 171 (citing § 2254(d)(1)-(2)). In such instance, the court should ask "whether it's debatable 'there is any reasonable argument that counsel satisfied [*Washington*'s] deferential standard.'" *Id.* & n.6 (citing *Richter*, 562 U.S. at 105). Howard failed to make this showing below and

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11 *Strickland*, 466 U.S. at 689.

12 *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

was therefore properly denied a COA.

A. Howard's mitigation-based IATC claim does not deserve encouragement to proceed further.

State habeas counsel argued that trial counsel failed to investigate and present mitigating evidence at the punishment phase of Howard's 1997 head injury, medical records and a neurological exam to support the head injury, Howard's jail records, and evidence of low IQ and mental retardation (intellectual disability). ROA.6116-21. The state court reasonably concluded that Howard failed to prove both deficient performance and prejudice under *Strickland*, ROA.6300-02, and the TCCA denied relief. *Ex parte Howard*, 2012 WL 6200688, at *1. Regarding counsel's performance, the state court found that defense counsel presented evidence to the jury during both stages of trial regarding Howard's mental state and did so through expert testimony and non-expert testimony from Howard's prior educators, coaches, friends, and family all regarding his unusual behavior and mental capabilities in their individual interactions with him. ROA.6301. The state court found that counsel also placed the mental health issue before the jury through cross examination of State's witnesses and direct examination of defense witnesses. ROA.6301. These findings are amply supported by the record, *see* Statement of the Case, Part I.D. 2., and are entitled to a presumption of correctness under § 2254(e)(1).

In the district court, Howard argued that trial counsel's performance was deficient with respect to the duty to investigate, develop, and present mitigating evidence documenting his unusual behaviors and deteriorating mental condition at the punishment phase of trial. ROA.476-519. He contended that trial counsel had

only "rudimentary knowledge" of his psycho-social history and the information obtained accounted for only the "most memorable highlights" and was the result of "perfunctory investigation." ROA.477, 478. At its crux, Howard claimed that counsel should have gone further and presented more or different evidence of mental decline or illness. *See id.* He did not specify how the state habeas court's decision was unreasonable, but simply reasserted his argument that counsel's representation was deficient in conducting the mitigation investigation. *See generally* ROA.476-519.

The district court rejected Howard's theories, opining that the state courts had reasonably adjudicated them. *Howard*, 2019 WL 4573640, at *27-34. The court noted that Howard's trial counsel "did investigate and provide witnesses and records as to Howard's childhood background, educational struggles, depression, and mental health issues," much of which Howard claimed counsel overlooked. *Id.* at *27, *29. The trial record reflects that counsel "presented a psychologist, a psychiatrist, and nineteen lay witnesses, consisting of close family members, extended family, educators, coaches, neighbors, and friends to testify regarding his mental decline and odd behaviors throughout the years." *Id.* at *29; *see* Statement of the Case, Part I.D.2, The district court reasoned that it would not "second guess" trial counsel's decisions regarding how many witnesses he should have called to present mitigation matters to the jury. *Howard*, 2019 WL 4573640, at *29. That decision is consistent with *Strickland*, which instructs that "a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight." 466 U.S. at 689. Indeed, Howard's claim is not that counsel utterly failed to investigate or present

mitigating evidence, but rather that counsel did not do enough. Reasonable jurists would not disagree that such argument "essentially comes down to a matter of degrees," and is "even less susceptible to judicial second-guessing." *Kitchens v. Johnson*, 190 F.3d 698, 703 (5th Cir. 1999), as the lower courts both correctly held. *Howard*, 2019 WL 4573640, at *29 (citing *Skinner v. Quarterman*, 576 F.3d 214, 220 (5th Cir. 2009); *Howard*, 959 F.3d at 173 n.15 (citing *Kitchens*).

When a petitioner fails to meet the deficiency prong, a court is not required to proceed further in its *Strickland* analysis. *Strickland*, 466 U.S. at 694. The Fifth Circuit denied Howard a COA after concluding that reasonable jurists could not debate the district court's decision that the state courts reasonably applied federal law in in determining that counsel's investigation was not deficient. *See Howard*, 959 F.3d at 171-73. The district court, however, decided to additionally examine whether Howard demonstrated that trial counsel's performance caused him prejudice. *Howard*, 2019 WL 4573640, at *31-34. In reviewing the state court adjudication and after reweighing the quality and quantity of the available mitigating evidence from trial and state habeas against the aggravating evidence, the district court concluded that Howard failed to meet *Strickland*'s prejudice prong. *Id.* at *31-34.

Reasonable jurists would not debate the district court's decision regarding *Strickland* prejudice. The district court found that the evidence at trial showed a "cold and deliberate murder" with Howard stealing a gun from his grandfather's room, walking several blocks to the convenience store, then the store's surveillance videotape showed Howard peering through the window several times to ensure that

no other persons were present before entering the store (SX-1). *Howard*, 2019 WL 4573640, at *32. Howard entered the store and made his way to the secured office area where the victim was sitting before cocking the gun and shooting the victim in the chest. As she lay screaming in pain on the floor, Howard asked "Do you have any more money in here?" *Id.* Howard then reached over the victim to steal a carton of cigarettes and take money from the cash register before leaving the back door. *Id.* As the district court reasoned, the video "is a compelling and powerful piece of aggravating evidence," and "[t]he visceral effect on a jury watching such a scene play out on the video as described above is difficult to overcome for any defense counsel." *Id.* The district court also summarized additional aggravating evidence included Howard's possible gang ties, his taking crack cocaine two weeks prior to the murder, his dealing and selling crack cocaine (e.g., conviction for delivery of a controlled substance and arrest for possession of crack two weeks prior to the murder), his arrests for other crimes, defiance with police, tendency towards violence (punching a pregnant teacher in the chest, fighting while in jail awaiting trial), being expelled from school, and his expressing no remorse for the murder and telling officers he was not sorry for his actions. *Id.*

In contrast, on the mitigating side of the scale was evidence at trial from prior educators, coaches, friends, and family regarding Howard's background, declining mental health, and odd behaviors, while the expert testimony largely focused on an explanation for Howard's odd behavior, diagnosing him with prodromal symptoms of schizophrenia. *See* Statement of the Case, Part I.D.2 above. Howard's "new"

mitigating evidence submitted by state habeas counsel consisted of two pages of records noting a gunshot wound to the head, jail records with "mental deficiency" circled, and a doctor's report noting a scalp wound. ROA.6149-50, 6169-72, 6174-77. However, the district court reasonably found such evidence was "double-edged" because it also reflected that Howard was oriented to time and place, was aware of having premeditatively committed robbery, aware of having shot the clerk, was likely to cause serious harm to others, was an escape risk, presented a serious threat of violence, and had substance abuse issues. *Howard*, 2019 WL 4573640, at *33 (citing ROA.6169-71). Reasonable jurists would not disagree that such double-edged evidence cannot support a showing of prejudice under *Strickland*. *Dowthitt v. Johnson*, 230 F.3d 733, 745 (5th Cir. 2000).

Howard fails to explain how the district court's decision regarding *Strickland* prejudice is debatable. At best, he states that he was prejudiced because a "complete picture of [his] mental illness and life history was not presented that would likely have resulted in a life sentence." Cert. Pet. 15. Other than mentioning his state habeas evidence of a head injury and a claim of "mental illness," *id.* at 19, Howard never identifies any mitigating evidence that counsel allegedly failed to discover and should have presented. Instead, he states that what mitigating evidence could have been presented is "set out" in his amended federal habeas petition or else was pointed out by state habeas counsel. *Id.* While the Fifth Circuit did not expressly address *Strickland*'s prejudice prong, it noted that Howard "merely cross-reference[d]" other supposedly undiscovered evidence listed in his habeas petition and that "a COA

applicant waives claims by directing the appellate court to briefing before the district court to support the request for a COA." *Howard*, 959 F.3d at 171 n. 8 (citing *McGowan v. Thaler*, 675 F.3d 482, 497 (5th Cir. 2012)). Reasonable jurists would not debate whether Howard waived review of the prejudice component of *Strickland*.

B. Howard's arguments to the contrary fail.

For both of his Questions Presented, Howard maintains that the Fifth Circuit erred "in considering the totality of three different trials." Cert. Pet. 2. This assertion is never explained in Howard's briefing, so it presents no basis for granting review. *See generally id.* at 2-21.

Howard also seeks review of whether the Fifth Circuit erred by excusing the district court's allegedly erroneous conclusion regarding the proper standard for reviewing IATC claims. Cert. Pet. 2. He claims the district court erred in not applying *Wiggins v. Smith*, 539 U.S. 510 (2003), that postdated his conviction in 2001. Cert. Pet. 14. No error occurred here. The district court reviewed Howard's IATC claims under *Strickland* which instructs that the reasonableness of counsel's actions is judged under professional norms prevailing at the time. *Howard*, 2019 WL 4573640, at *26. Howard does not allege the lower court would have reached a different decision had it followed *Wiggins*. In rejecting Howard's contention, the Fifth Circuit concluded that "under professional standards for *any* era, reasonable jurists would not debate that the state courts reasonably applied federal law in holding that Howard had received effective assistance." *Howard*, 959 F.3d at 173 n.13 (emphasis

in original).[13] Review is not warranted on this issue.

In his Reasons for Granting the Writ, Howard complains of the Fifth Circuit's noting that trial counsel argued at both opening and closing regarding mental health and had "looped" in experts as needed. Cert. Pet. 14 (citing *Howard*, 959 F.3d at 172). He states that "arguments are never evidence," and contends the court should have focused on what actually occurred during the presentation of evidence, including that counsel presented no evidence on insanity. *Id.* Howard overlooks that an IATC claim regarding insanity was never raised to the Fifth Circuit, *see* Pet. App. 1, and no such claim is properly before this Court. Regardless, the Fifth Circuit's brief mention of counsel's argument was entirely proper in the context of reviewing Howard's underlying IATC claim which challenged counsel's investigation, development and presentation of mitigating evidence. No error exists here.

Finally, for both of his IATC claims, Howard faults the district court for relying on state-court findings and conclusions that were drafted by the prosecution, signed off by a different judge than presided over trial, and were issued without a hearing. Cert. Pet. 14, 17, 19-20. By his account, the state court findings are not entitled to any presumption of correctness. *Id.* at 14, 20. Yet Howard never told the district court he had a problem with the state courts' method of factfinding, so the Fifth Circuit

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[13] Howard also states in passing that the district court erred in refusing to apply the American Bar Association's professional guidelines. Cert. Pet. 15. Word for word, this is the same contention made in his COA Application. Mot. COA 43. The Fifth Circuit found the argument waived for inadequate briefing because Howard did not explain what the guidelines require or why they would make it debatable whether his attorney's performance was deficient. *Howard*, 959 F.3d at 173 n. 13 (citing *Woods v. Cockrell*, 307 F.3d 353, 357 (5th Cir. 2002) (holding that a COA movant has waived an issue because it was briefed inadequately). This Court should do so likewise.

found the argument forfeited. *Howard*, 959 F.3d at 172 n. 9 (citing *Thompson v. Davis*, 916 F.3d 444, 460 (5th Cir. 2019) (holding that a COA petitioner could not press an argument that was not presented to the district court). This Court has long held that it will not decide issues raised for the first time on petition for certiorari nor decide federal questions not raised and decided in the court below. *See, e.g., Heath v. Alabama*, 474 U.S. 82, 87 (1985).

In any event, the Fifth Circuit has rejected the argument that habeas findings adopted verbatim from those submitted by the state are not entitled to deference. *Green v. Thaler*, 699 F.3d 404, 416 n. 8 (5th Cir. 2012) (citations omitted). Also, just because a different judge presided over state habeas proceedings does not deprive the state court findings of deference because AEDPA does not provide for such a distinction. And "a full and fair hearing in state court is not a prerequisite to applying AEDPA's deferential scheme." *Wiley v. Epps*, 625 F.3d 199, 207 (5th Cir. 2010). The district court was thus required to give deference to the state-court adjudications under § 2254(d), and to presume the factual findings to be correct unless rebutted by clear and convincing evidence otherwise, § 2254(e)(1). Reasonable jurists would not disagree with the district court's determination that Howard failed to meet these standards and in turn, did not merit a COA.

III. The Fifth Circuit Properly Denied a COA on Howard's IATC Claim Alleging Failure to Investigate and Present Evidence of Mental Illness Regarding Competency and His *Miranda* Waiver.

A. Howard's competency-based IATC claim does not deserve encouragement to proceed further.

On state habeas, Howard alleged that trial counsel "failed to handle mental competency issues appropriately" by not developing "available evidence of mental illness." ROA.6071, 6072. He argued that jail records included a doctor's report that would have "supported a theory of mental illness" and that his initial assessment at the jail reflected his having a "mental deficiency" that was noted on the day of his arrest. ROA.6072 (citing ROA.6169-75). He also faulted trial counsel for not calling Dr. Fason to testify during the second trial on competency. ROA.6073. The state court found that Howard presented evidence to the jury regarding Howard's mental state from Dr. Duncan and from non-expert witnesses, and through cross examination of State's witnesses, and the TCCA rejected the claim for Howard's failure to prove both deficient performance and prejudice. ROA.6301-02; *Ex parte Howard*, 2012 WL 6200688, at *1.

The district court found that Howard's competency-based IATC claim was a continuation of his first IATC claim challenging counsel's mitigation investigation. *Howard*, 2019 WL 4573640, at *46. Notably, Howard failed to discuss and establish how trial counsel was deficient for purposes of *Strickland*, other than his complaint that that trial counsel failed to conduct an adequate mitigation investigation. *Id.* Because the district court had already addressed, and rejected, Howard's mitigation IATC claim, the court incorporated its prior discussion into the analysis, but did not repeat it here. *See id.* The district court instead focused on *Strickland*'s prejudice prong and denied habeas relief for Howard's failure to overcome § 2254(d) based on the state court's reasonable application of *Strickland*'s prejudice standards. *Howard*,

2019 WL 4573640, at *46-48. Indeed, even if it were debatable whether trial counsel did as thorough a job as appropriate in investigating Howard's psycho-social history and mental disorders, trial counsel's investigation into more mitigating evidence has little bearing on Howard's competency. *Id.* at *48.

The relevant question for the IATC analysis was whether trial counsel was on notice for signs of then-present incompetence. *See Indiana v. Edwards*, 554 U.S. 164, 170 (2008) (focusing on whether the defendant has "sufficient present ability to consult with his lawyer"). As the district court reasoned, competency to stand trial revolves around the criminal defendant's understanding of the proceedings and consequences and his ability to communicate. *Howard*, 2019 WL 4573640, at *48. Dr. Duncan reported that during his mental competency evaluation, Howard provided a reasonably detailed narrative of the incident and was aware of the charges against him and possible consequences, although Howard may have been exhibiting "an emerging thought disorder, possibly schizophrenia." ROA.1437-38.

Although Howard presented some evidence of mental illness that developed after trial—records demonstrating that Howard was diagnosed with schizophrenia in July 2002 *after he was sent to death row* on the capital murder conviction, ROA.692-404—such evidence does not demonstrate that Howard was prejudiced by counsel's handling of the mental competency issue. Mental illness and competency are not coextensive; a defendant can be both mentally ill and competent to stand trial. *Mays v. Stephens*, 757 F.3d 211, 216 (5th Cir. 2014)). The district court thus denied relief for Howard's failure to show *Strickland* prejudice and overcome § 2254(d). Because

reasonable jurists would not disagree with the decision, the Fifth Circuit properly denied Howard a COA. *Howard*, 959 F.3d at 173-74.

Howard now contends that the state court's findings that counsel was not ineffective are not entitled to a presumption of correctness because they are "simply wrong" or inapposite to the record. Cert. Pet. 19-20. However, on federal habeas review, the district court noted that Howard's amended habeas petition was "silent regarding how the state court is unreasonable pertaining to its findings of fact and conclusions of law regarding Howard's competency to stand trial." *Howard*, 2019 WL 4573640, at *46. On appeal, Howard pointed to several alleged omissions by his attorney as proof that the state court findings were unreasonable; however, the Fifth Circuit correctly refused to grant a COA on arguments the district court had no chance to address. *Howard*, 959 F.3d at 174 (citing *Thompson*, 916 F.3d at 460). Howard does not discuss the propriety of this ruling, which precluded COA on the IATC claim. Instead he raises the same alleged omission to this Court. Cert. Pet. 20. This Court would do better to grant certiorari in a case where procedural impediments to reaching the merits of a claim are acknowledged and addressed by the petitioner.

Even if Howard's new arguments are considered, they do not rebut the presumption of correctness afforded the state-court findings because they are not clear and convincing evidence to the contrary. Should the Court decide to reach Howard's contentions that various state-court findings are "simply wrong," it should reject them in their entirety.

First, Howard alleges that counsel did not even consider his mental competency until urged to do so by Dr. Fason. Cert. Pet. 20. While Dr. Fason did write a letter to counsel recommending that Howard be administered testing related to competency, ROA.6147, that fact does not establish Howard's conclusory assertion regarding counsel's representation.

Second, Howard mistakenly claims that defense counsel "did not discuss" Dr. Duncan's report with him until April 10, 2001, the day counsel began opening the defense's case on guilt/innocence. Cert. Pet. 20. To the contrary, Dr. Duncan examined Howard on March 8, 2001, and issued his written medical narrative on March 9, 2001. ROA.1436-38. On direct examination, Dr. Duncan affirmed that he did not speak with defense counsel before conducting his independent medical evaluation of Howard, ROA.4283, but they "talked afterwards." ROA.4292. Howard also overlooks that counsel had Dr. Duncan's report by March 15, 2001, if not before, because counsel gave notice that day that he had reviewed the information from Dr. Duncan and was changing Howard's plea to not guilty by reason of insanity. ROA.2671-72.

Third, although the State sought a competency hearing after Dr. Duncan testified during the guilt/innocence stage, ROA.4308, the record refutes Howard's claim that counsel was "woefully unprepared." Cert. Pet. 20. Trial counsel told the court that Dr. Duncan does not feel Howard is competent to stand trial and that Dr. Fason has given a diagnosis of schizophrenic disorder and would question Howard's ability to stand trial at this time. ROA.4312-13. During the first trial on competency, defense counsel presented testimony from two experts and two lay witnesses, and the

trial ended in a deadlock. *See* Statement of the Case, Part I.C., above. During the second hearing, counsel called Dr. Duncan and seven lay witnesses. *See id.* Based on the evidence and credible testimony of the witnesses, the jurors at the second trial on competency made the factual determination that Howard was competent to stand trial. ROA.5465-66. The fact that the jury decided against Howard does not prove that counsel was unprepared for the hearings or that Howard was prejudiced by counsel's performance.

Reasonable jurists would not debate that Howard's newly raised contentions are not clear and convincing evidence that rebuts the presumption of correctness afforded the state court's factual finding under § 2254(e)(1), especially when they are largely refuted by the record as argued above. Because Howard's arguments regarding counsel's supposedly deficient performance were not raised below and he fails to address *Strickland* prejudice, the Court should deny further review.

B. Howard's *Miranda*-based IATC claim does not deserve encouragement to proceed further.

On state habeas, Howard argued that his attorneys investigated and determined that he had mental deficiencies but then failed to use his ADHD and potential schizophrenia to attack the voluntariness of his custodial statement. ROA.6071. The state court found, and the record amply supports, that Howard was provided his *Miranda* rights before providing his statement, that he was cognizant of what he was doing at the time, and that he indicated in writing that he was aware of his rights. ROA.6301; *see* Statement of the Case Part I.A. above. The state court also found that counsel did not object to the introduction of the statement but challenged

whether it was voluntarily made through cross-examination of law enforcement officers. ROA.6301. On this record, the state court concluded that counsel did not perform deficiently or prejudice Howard's defense, ROA.6302, and the TCCA denied habeas relief, *Ex parte Howard*, 2012 WL 6200688, at *1.

For Howard's *Miranda*-based IATC claim, the district court denied habeas relief because Howard failed to show that the state court's decision that trial counsel's performance was not deficient and did not result in prejudice was a reasonable application of *Strickland*. *Howard*, 2019 WL 4573640, at *55. Once again, the district court found that Howard's amended habeas petition was "silent regarding how the state court is unreasonable pertaining to its findings of fact and conclusions of law regarding Howard's waiver of his *Miranda* rights." *Id.* at *54. He did not discuss how counsel was deficient for purposes of *Strickland*, other than re-raising his complaint that counsel failed to conduct an adequate mitigation investigation regarding Howard's mental illness. ROA.525, 527-29.

While Howard' s mental status may be a factor in considering the voluntariness of his statement, Howard did not show or even allege that the actions of law enforcement during his arrest and questioning amounted to official coercion such that his confession was involuntary. *Colorado v. Connelly*, 479 U.S. 157, 163-67 (1986); *see Carter v. Johnson*, 131 F.3d 452, 464 (5th Cir. 1997) ("[I]n the absence of any evidence of official coercion, [petitioner] has failed to establish that his confession was involuntary."). Nor would such a claim have succeeded in light of trial testimony elicited from the Texas Ranger who took Howard's statement. *See* Statement of the

Case, Part I.A. Counsel also had no basis to challenge the confession based on Howard's demeanor and then-current mental status. Wilson's undisputed testimony established that Howard was very cognizant of what was going on, including that he caught a misspelled word in the typed version of his statement. ROA.4229, 4233-34, 5528. The district court rejected Howard's IATC claim for his failure to show that the state court's findings were unreasonable. *Howard*, 2019 WL 4573640, at *53-55.

On appeal, the entirety of Howard's argument appears to be that defense counsel "never attempted to challenge the statement in any form, including that [he] was not competent to give a knowing and voluntary waiver of rights." Mot. COA 52; Cert. Pet. 20. The Fifth Circuit faulted Howard "for not explaining how a better investigation of his mental health could somehow have led to a successful challenge to his confession." *Howard*, 959 F.3d at 174. Howard failed to engage with the district court's reasoning that the evidence showed that he understood his rights and was not coerced into waiving them and confessing, and he offered no theory why the court's conclusion was unreasonable. *Id.* The Fifth Circuit thus properly denied a COA because Howard failed to show that jurists of reason could disagree with the district court's determination that counsel's investigation "was good enough." *Id.*

CONCLUSION

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

Respectfully submitted,

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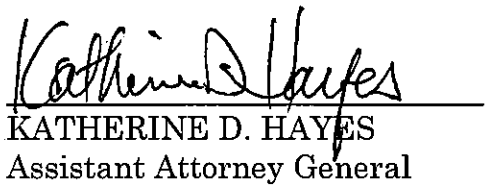

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