No. _____

In The
Supreme Court of the United States

JUAN JOE CANO,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Texas Court Of Criminal Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Five minors accused petitioner of sexual abuse in response to leading and suggestive questioning by their parents and repeated their accusations at petitioner's trial. Petitioner's trial counsel did not impeach them with prior inconsistent statements made either to a parent or a forensic interviewer. Counsel did not retain a psychologist to review the discovery and testify that the leading and suggestive questioning had the potential to contaminate the accusations (although he argued this). Petitioner was convicted and sentenced to 25 years in prison without parole. Petitioner sought habeas corpus relief on the basis of ineffective counsel. The state trial court denied an evidentiary hearing and ordered counsel to respond to the allegations by affidavit. The prosecutor privately suggested to counsel in writing what his responses should be. Counsel filed an affidavit that incorporated the prosecutor's suggestions without disclosing their collusion. When petitioner discovered the deception, he again moved for an evidentiary hearing. The trial court denied a hearing, credited counsel's statements in his affidavit, and entered findings of fact and conclusions of law recommending that relief be denied. The Texas Court of Criminal Appeals (TCCA) adopted the findings and conclusions as its own and denied relief without written order. The questions presented are:

I. Was petitioner denied the effective assistance of counsel because trial counsel failed to impeach the complainants with

QUESTIONS PRESENTED—Continued

their prior inconsistent statements and failed to call a psychologist to testify that their parents had engaged in leading and suggestive questioning that had the potential to contaminate their accusations of sexual abuse?

II. Did the state courts deny petitioner procedural due process by rejecting his substantial ineffective assistance of counsel claim without conducting a live evidentiary hearing, particularly in view of the fact that trial counsel's affidavit was prepared in collusion with the prosecutor?

RELATED CASES

- *State v. Cano*, Nos. 14-026 and 14-031, 130th District Court of Matagorda County. Judgments entered November 6, 2014.
- *Cano v. State*, Nos. 13-15-0005-CR and 13-15-0007-CR, Thirteenth Court of Appeals of Texas. Judgments entered August 4, 2016.
- *Cano v. State*, Nos. PD-1046-16 and PD-1048-16, Texas Court of Criminal Appeals. Judgments entered November 9, 2016.
- *Ex parte Cano*, Nos. 14-026A and 14-031A, 130th District Court of Matagorda County. Judgments entered December 31, 2020.
- *Ex parte Cano*, Nos. WR-92,266-01 and WR-92,266-03, Texas Court of Criminal Appeals. Judgments entered June 16, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Juan Joe Cano, respectfully petitions for a writ of certiorari to review the judgments of the TCCA.

OPINIONS BELOW

The TCCA's denials of habeas corpus relief without written order in petitioner's related cases (App. 1) are unreported. The state district court's findings of fact and conclusions of law (App. 3) are unreported. The TCCA's refusals of discretionary review on direct appeal (App. 13) are unreported. The Texas Court of Appeals' opinion affirming the convictions on direct appeal (App. 15) is available at 2016 WL 4145966. The judgments of conviction of the state district court (App. 26) are unreported.

JURISDICTION

The TCCA denied habeas corpus relief on June 16, 2021. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides, in pertinent part, "In all criminal

prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defen[s]e."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, "No State shall . . . deprive any person of . . . liberty . . . without due process of law. . . ."

STATEMENT

A. Procedural History

Petitioner was indicted for continuous sexual abuse of a child, indecency with a child by contact, and indecency with a child by exposure in the 130th District Court of Matagorda County, Texas. A jury convicted him and assessed his punishment at 25 years in prison for continuous sexual abuse, two years in prison for indecency by contact, and two years of probation for indecency by exposure on November 6, 2014.[1] The Texas Court of Appeals affirmed petitioner's convictions on August 4, 2016. The TCCA refused discretionary review on November 9, 2016. *Cano v. State*, Nos. 13-15-0005-CR and 13-15-0007-CR, 2016 WL 4145966 (Tex. App.—Corpus Christi-Edinburg, Aug. 4, 2016, pet. ref'd). Petitioner did not file a petition for a writ of certiorari.

Petitioner filed a state habeas corpus application on August 21, 2020, alleging that he was denied the

[1] Petitioner does not challenge his conviction and probated sentence for indecency by exposure in this proceeding.

effective assistance of counsel at trial. The trial court refused petitioner's request to conduct an evidentiary hearing and entered findings of fact and conclusions of law recommending that relief be denied based on an affidavit of trial counsel that was prepared through collusion with the prosecutor. The TCCA denied relief without written order "on the findings of the trial court without a hearing and on the Court's independent review of the record" on June 16, 2021. *Ex parte Cano*, Nos. WR-92,266-01 and WR-92,266-03 (Tex. Crim. App. June 16, 2021).

B. Factual Statement

1. The Trial

Petitioner's wife, Cynthia (Cindy) Cano, is the mother of David Garcia and Michelle Garza (3 R.R. 28-29).[2] David and his wife, Melody, are the parents of twin daughters, Ab.G. and J.G. (3 R.R. 28). Michelle and her ex-husband, Jose, are the parents of An.G. and Au.G. (3 R.R. 29-30, 90-91). Michelle's boyfriend, Elmo Cano, is the father of K.C. (3 R.R. 10). Thus, petitioner is the step-grandfather of Ab.G., J.G., An.G., and Au.G.

Petitioner and Cindy took Ab.G. and J.G. to a movie on July 6, 2013 (3 R.R. 33). Melody and David picked them up at the Canos' home that night (3 R.R. 34).

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[2] Petitioner will refer to his relatives by their first names to avoid confusion.

Melody testified that, as she was undressing her infant son, Jonathan, to give him a bath, J.G. said that she "had seen Papa John" (3 R.R. 36). Melody asked what she meant. J.G. said that she walked in the bathroom and saw his privates. Melody responded that accidents can happen. J.G. said that Ab.G. "saw it, too." Melody spoke to the girls together (3 R.R. 38, 55). Ab.G. said that petitioner unzipped his pants, took her hand, and made her touch his penis (3 R.R. 38-39). Ab.G. also said that petitioner put his hand in her panties and touched her at the theater when Cindy and J.G. went to get snacks (3 R.R. 41-42). Melody became angry and upset, went outside, and had Ab.G. tell her father what had happened (3 R.R. 43-44). Melody called her mother, Diane Rieger, a retired Bay City police officer (3 R.R. 45).

David called his sister, Michelle, and asked whether petitioner had ever touched her children (3 R.R. 88). Michelle said that she had not heard anything like that (3 R.R. 88).

Michelle called Ab.G. and Au.G., who were with their father, Jose, and asked, "Has anybody ever touched you?" (3 R.R. 90, 92-93). They said no (3 R.R. 93). She then asked, "Has Grandpa John ever touched you?" An.G. started crying (3 R.R. 94). Michelle said to tell her father that she was coming to get them (3 R.R. 95). Michelle called her boyfriend, Elmo, and told him to pick her up so they could get the girls (3 R.R. 95-96). She and Jose talked to An.G. and Au.G. together while Elmo went to pick up his daughter, K.C. (3 R.R. 96).

Elmo testified that, while K.C. was attending a vacation Bible school in Bay City during the summer of 2012, she called and said that she wanted to come home early because she was scared (3 R.R. 68-69). He picked her up and took her home (3 R.R. 70). After Michelle called Elmo in July 2013, he asked K.C. if anything had happened to her while she was in Bay City (3 R.R. 70, 73). Elmo testified that the look on K.C.'s face was "undescribable" (3 R.R. 73). Elmo asked K.C. whether petitioner had touched her (3 R.R. 73-74). She said yes, started crying, put her hands over her privates, and said "there" (3 R.R. 74). She also said that it happened the night that she called and told him that she wanted to come home (3 R.R. 75).

Michelle, who worked for the probation department in Victoria, Texas, called the police (3 R.R. 81, 100). The complainants went to the Children's Assessment Center, where videotaped forensic interviews were conducted (3 R.R. 11-13, 101, 143). Jennifer Mikkelson, the forensic interviewer, testified that she saw no indication of deception or coaching, and the complainants' stories were consistent with the summaries of the allegations she had received (3 R.R. 149-51). Corporal Maria Guajardo testified that, after the forensic interviews, she believed that there was enough evidence to corroborate the complainants' outcries of sexual abuse, and she filed charges (3 R.R. 13).

An.G. (3 R.R. 166-68, 177, 184-86), Au.G. (3 R.R. 221, 226, 229, 231-32), Ab.G. (4 R.R. 11-25, 34-35), J.G. (4 R.R. 40, 50-55), and K.C. (4 R.R. 68-78,

81-82) each testified about the manner in which petitioner allegedly abused them.

Cindy testified for the defense that she had been married to petitioner for 12 years and they owned a restaurant (4 R.R. 88).[3] Ab.G. and J.G. went to a movie with them and spent the night at their home one time (4 R.R. 91). Although petitioner was alone with one girl while Cindy took the other to get popcorn, he was not alone with them at home for more than a minute or two (4 R.R. 93, 96-97, 141-42). Cindy also testified that petitioner was not alone with An.G., Ab.G., and K.C. when they spent the night in 2013 (4 R.R. 113, 115-16, 118). She explained that petitioner is a diabetic who cannot get an erection (4 R.R. 122-23). His penis is not "visible" when he is naked (4 R.R. 123).

Diana Estrada testified for the State in rebuttal that she had worked off and on at the Canos' restaurant from 2009 through 2012 (4 R.R. 176).[4] She was on probation for possession of cocaine, had a pending motion to revoke her probation, and had been in jail for three months at the time she testified against petitioner (4 R.R. 174-75, 200). Susan Maxwell, an investigator with the district attorney's office, came to see Estrada in jail on October 1, 2014, and obtained a statement (4 R.R. 201; 1 H.C.R. 89, 91). Estrada testified that the State did not offer a benefit for her

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[3] Petitioner was born on December 2, 1949 (C.R. 5). He was 63 years old in July 2013.

[4] Estrada, who was 39 years old at the time of trial, died in 2018 (1 H.C.R. 88).

testimony, and she did not believe that testifying would help her when she went to court in her own case (4 R.R. 175-76, 202-03).[5]

Estrada testified that petitioner touched her breasts and tried to touch her vagina at the restaurant when Cindy was in the area (4 R.R. 189). Eventually, they had a consensual sexual relationship (4 R.R. 207). She last saw him with an erection in 2012 (4 R.R. 199). She did not know whether he could get an erection in 2013 (4 R.R. 208).

The prosecutors argued that Cindy had left petitioner alone with the complainants but was not forthcoming about it (4 R.R. 242-43); that the complainants were telling the truth because they described the details of the sexual abuse (4 R.R. 212-14, 240-41); that

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[5] Predictably, Estrada did benefit from testifying against petitioner. One week after she testified, her lawyer, Bill Leathers, and the prosecutor, Lindsay Deshotels, agreed that she would plead true to the motion to revoke and be sentenced to eight months with credit for time served and plead guilty to two misdemeanor charges and be sentenced to time served (1 H.C.R. 90). They asserted in an email exchange that they made the deal after she testified against petitioner and that it had nothing to do with her testimony. District Attorney Steven Reis instructed Deshotels to place a copy of the email in both Estrada's file and petitioner's file. He anticipated—correctly—that the day would come when the State would have to explain why the favorable resolution of her cases had nothing to do with her testimony. The deal was consummated the following month (1 H.C.R. 92-93). Leathers asserted that he could not remember the case, and Reis asserted that the State's file was "no longer available" (1 H.C.R. 96). Thus, petitioner could not prove in the habeas proceeding that Estrada had an agreement to receive consideration for her testimony. But, undoubtedly, she did.

they had no reason to lie (4 R.R. 246); and, that Mikkelson observed no indication of deception or coaching (4 R.R. 212).

Trial counsel, Mario Madrid, argued that Melody had overreacted when J.G. said that she saw petitioner's penis (4 R.R. 224); that Michelle scared An.G. and Au.G. by getting angry, crying, and asking whether petitioner had touched them, which caused them to go along with her and say yes (4 R.R. 225); that the fact that the parents believed the girls did not make the allegations true (4 R.R. 223); that there was no physical evidence to corroborate their testimony (4 R.R. 221-22); and, that Estrada testified in an effort to obtain a lesser sentence in her own case (4 R.R. 235).

2. The State Habeas Corpus Proceeding

Undersigned counsel, who represented petitioner in the state habeas proceeding, contacted Madrid, explained that he was conducting an investigation to determine whether there was a basis for habeas corpus relief, obtained his file, and asked whether he would answer written questions about the trial. Madrid agreed to do so. Counsel sent the questions and record excerpts on May 11, 2020 (1 H.C.R. 97) and sent additional questions on May 15 (1 H.C.R. 107). Madrid responded by email on May 27 that he did not have time and that he would answer questions or testify only if

the court ordered him to do so (1 H.C.R. 119).[6] Counsel sent the following email on May 27 (1 H.C.R. 120):

> I encourage you to reconsider your decision not to answer my questions. If you had a strategic reason for the acts and omissions that are the subject of the questions, now is the time to tell me. If I am persuaded that the strategy was sound, I will reject the case. Otherwise I will have no choice but to file a habeas corpus application alleging that you were ineffective. I need your answer to complete my evaluation of the case. I encourage you to respond.

Madrid did not respond.

Petitioner filed a state habeas corpus application alleging that Madrid was ineffective in the following respects:

- failing to file a motion in limine and object to inadmissible opinion testimony that the complainants were telling the truth and that their parents believed them and did not influence them;
- referring to the complainants as the "victims";
- opening the door to testimony that petitioner had a consensual sexual relationship with Estrada and could get an erection;

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[6] It is worth observing that the criminal justice system in Texas was virtually shut down in May 2020 because of the pandemic. Madrid had ample time to answer the questions.

- failing to impeach the prosecution witnesses with their prior inconsistent statements; and
- failing to call a psychologist to testify that the parents had engaged in leading and suggestive questioning that had the potential to contaminate the complainants' accusations of sexual abuse.

Petitioner also filed a motion for an evidentiary hearing in which he emphasized that Madrid had refused to answer habeas counsel's questions about the case and that it would be unfair for the court to believe Madrid's affidavit simply because he is a lawyer without providing petitioner an opportunity to cross-examine him (1 H.C.R. 170).

Twelve days after petitioner filed the habeas application, the State filed a 35-page answer (1 H.C.R. 174).[7] District Attorney Reis suggested in the answer possible strategic reasons for Madrid's challenged acts and omissions (1 H.C.R. 188-205).

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[7] In undersigned counsel's experience, it is unusual for a habeas prosecutor in Texas to file a detailed answer to a habeas application alleging ineffective assistance of counsel before the trial court has conducted an evidentiary hearing or defense counsel has filed an affidavit. The State typically files a general denial or makes no response, as article 11.07, § 3(b) of the Texas Code of Criminal Procedure provides, "Matters alleged in the application not admitted by the state are deemed denied." Undersigned counsel's antenna went up, as he suspected that there was a method to Reis's madness in filing a detailed answer suggesting what Madrid's strategy might have been. Counsel was correct.

The trial court ordered Madrid to file an affidavit (1 H.C.R. 173). Madrid filed an affidavit that embraced the State's suggested strategies as his own (1 H.C.R. 210-19). Importantly, he sought to deceive the court and petitioner by asserting that, in preparing the affidavit, he reviewed "the file I kept of the case . . . and . . . the court reporter's record" (1 H.C.R. 211). He deliberately omitted that he also had reviewed the State's answer, which set forth in detail its arguments regarding why he was not ineffective.

After habeas counsel read Madrid's affidavit, he made a state-law public information act request that District Attorney Reis disclose all emails, text messages, and other communications between the district attorney's office and Madrid regarding the affidavit (1 H.C.R. 239). Reis provided several emails and, just four minutes later, notified Madrid by email that he had done so (1 H.C.R. 240).[8]

The emails proved to be illuminating. The relevant events concerning the emails are as follows:

- The trial court signed the order for Madrid to file an affidavit on August 24, 2020, at 10:17 a.m. (1 H.C.R. 173).
- Reis sent Madrid an email at 4:19 p.m. on the same day and attached the State's

[8] Reis undoubtedly notified Madrid that he had disclosed their email correspondence to habeas counsel to ensure that Madrid would not deny that he had used the State's answer to prepare his affidavit if there was an evidentiary hearing and he was asked what he had reviewed.

answer and its proposed findings of fact and conclusions of law in a similar case to "provide some guidance to you as you prepare your responses ordered by the court in this case" (1 H.C.R. 243).

- On September 2, 2020, Reis sent Madrid an email attaching the State's answer in petitioner's cases and suggested that Madrid "may wish to review our response . . . before preparing your affidavit" (1 H.C.R. 244).

This is a classic example of how Texas prosecutors "woodshed" witnesses.[9] That Reis found it necessary to provide the State's answer as "guidance" for Madrid to prepare his affidavit speaks volumes—either Reis did not consider Madrid competent enough to prepare an affidavit on his own or he wanted to ensure that Madrid's affidavit mirrored the State's position. Moreover, Reis did not caution Madrid to use the State's answer for "guidance" only if it truthfully set forth the reasons for his acts or omissions and to be sure to disclose that he had reviewed the answer in preparing his affidavit.

Petitioner again moved for an evidentiary hearing (1 H.C.R. 230). Petitioner asserted that Madrid, by deliberately omitting from his affidavit that he had reviewed the State's answer—although he clearly had done so—intended to mislead the trial court and petitioner. This critical omission called into question the

[9] USLegal.com defines "woodshedding" as "the instruction that is given to a witness in order to make him/her respond to one party's favor."

credibility of the entire affidavit, which simply parroted the State's answer. Petitioner contended that a live evidentiary hearing was required because the affidavit was not reliable, as Madrid failed to disclose that it was based on what Reis considered to be the "correct answers" (1 H.C.R. 232).

The trial court refused to conduct an evidentiary hearing and relied on Madrid's explanations for the challenged acts and omissions in making its findings of fact without acknowledging that, in effect, Reis had provided the answers before Madrid "took the test" (2 H.C.R. 8). Petitioner filed objections, contending that the TCCA should reject Madrid's affidavit as unreliable and grant habeas corpus relief or, in the alternative, remand for a live evidentiary hearing to provide petitioner with an opportunity to cross-examine him (2 H.C.R. 4).

The TCCA denied relief without written order "on the findings of the trial court without a hearing and on the Court's independent review of the record" (App. 1-2).

REASONS FOR GRANTING CERTIORARI

The old adage, "Winners never cheat, cheaters never win," obviously does not apply in Matagorda County, Texas. District Attorney Reis provided what he considered to be the correct answers to Madrid to incorporate into the affidavit that the trial court had ordered Madrid to file. Madrid not only virtually

plagiarized Reis's answers as his own without attribution but also attempted to mislead the trial court and petitioner by stating that his affidavit was based on his review of his file and the court reporter's record of the trial. This did not bother the trial court in the least, as it refused to conduct a live evidentiary hearing and relied on Madrid's affidavit in making findings of fact and conclusions of law recommending that relief be denied. And it certainly did not prevent the TCCA from adopting the trial court's findings as its own and denying relief without written order based on those findings. This sham state habeas corpus proceeding denied petitioner procedural due process.

This Court has long held that the Due Process Clause of the Fourteenth Amendment requires a live evidentiary hearing—as opposed to a "paper" hearing—when there is a significant interest at stake. *See, e.g.*, *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970) (due process requires that a welfare recipient facing the termination of benefits have "an effective opportunity to defend by confronting any adverse witnesses"). Undoubtedly, a state habeas corpus petitioner who has raised a substantial ineffective assistance of counsel claim should receive the same process. *See Martinez v. Ryan*, 566 U.S. 1, 12 (2012) (acknowledging that the Sixth Amendment right to the effective assistance of counsel is the "foundation for our adversary system").

I. Petitioner Was Denied The Effective Assistance Of Counsel Because Trial Counsel Failed To Impeach The Complainants With Their Prior Inconsistent Statements And Failed To Call A Psychologist To Testify That Their Parents Had Engaged In Leading And Suggestive Questioning That Had The Potential To Contaminate Their Accusations Of Sexual Abuse.[10]

To obtain relief on an ineffective assistance of trial counsel claim, the defendant must show that counsel's performance was deficient under prevailing professional norms and there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984).

A competent criminal defense lawyer has a duty to try to exclude inadmissible evidence, impeach prosecution witnesses and, when required, present expert testimony to support the theory of defense.

Petitioner was convicted on the basis of the complainants' testimony, uncorroborated by any physical or medical evidence to substantiate that any sexual

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[10] Petitioner has focused on Madrid's most glaring errors. Should this Court remand for an evidentiary hearing, he will continue to pursue the allegations that Madrid was ineffective by failing to file a motion in limine and object to inadmissible opinion testimony that the complainants were telling the truth and that their parents believed them and did not influence them; referring to the complainants as the "victims"; and opening the door to testimony that petitioner had a consensual sexual relationship with Estrada and could get an erection.

activity occurred. Madrid made no effort to impeach the complainants with their prior inconsistent statements to a parent or a forensic interviewer. Madrid did not consult with or call a psychologist to educate the jury how the parents had engaged in leading and suggestive questioning that had the potential to contaminate the complainants' accusations of sexual abuse. The trial court refused to conduct a live evidentiary hearing and recommended that relief be denied based on an affidavit that Madrid prepared in collusion with Reis. The TCCA denied relief without explanation. The TCCA decided petitioner's substantial ineffective assistance of counsel claim in a way that conflicts with relevant decisions of this Court and justifies the grant of certiorari. SUP. CT. R. 10(c).

A. Counsel Failed To Impeach The Prosecution Witnesses With Their Prior Inconsistent Statements.

1. J.G.

J.G. testified that, when she walked in the bathroom and saw petitioner partially undressed, he did not say anything, and she closed the door (4 R.R. 48). However, the offense report reflects that Melody told the police that J.G. said that, when she opened the door and saw petitioner, he "screamed at her to close the door and she did" (1 H.C.R. 126). Madrid did not ask J.G. about this prior inconsistent statement and, if she denied it, call Melody to impeach her.

J.G. told Mikkelson during the forensic interview that Ab.G. said that she touched petitioner's privates "but then she lied" (1 H.C.R. 137; AX 12 at 1:20:44-1:21:10). Mikkelson asked, "Who did she lie to?" (1 H.C.R. 137; AX 12 at 1:21:18). J.G. said, "Me. Then I told mommy and then she lied to mommy because she said that she was scared" (1 H.C.R. 137; AX 12 at 1:21:20). Mikkelson asked what lie she told her mother (1 H.C.R. 137; AX 12 at 1:21:29). J.G. responded, " . . . she said that she got to touch it but then she said that she was kidding and . . . I told her the joke again and then [she] said she was just kidding" (1 H.C.R. 137; AX 12 at 1:21:33). Madrid did not ask J.G. about whether Ab.G. lied and, if J.G. denied it, call Mikkelson to impeach her.

2. Ab.G.

Ab.G. testified on direct examination that she told her mother about the sexual abuse when her mother asked about it (4 R.R. 27). However, Melody made a written statement that, when J.G. said that Ab.G. had seen petitioner's privates too, Ab.G. "immediately became defensive saying, 'No she hadn't' " (1 H.C.R. 139). Melody told Ab.G. "that she should tell me the truth because God does not like it for people to lie." Ab.G. then said that she did see petitioner's privates. Madrid did not ask Ab.G. whether she initially told her mother that she did not see petitioner's privates and whether she changed her story only after her mother told her that "God does not like it for people to lie" and, if she denied this, call Melody to impeach her.

Ab.G. testified on direct examination that, when she went to petitioner's house after the movie, he unzipped his pants, told her to come over, grabbed her hand, and made her touch his penis (4 R.R. 22-24). However, Melody told the police that Ab.G. told her that petitioner took his penis out of his pants and showed it to her, but she did not touch it, and he did not touch her on this occasion (1 H.C.R. 127). Madrid did not ask Ab.G. about this prior inconsistent statement and, if she denied it, call Melody to impeach her.

Madrid did not ask Ab.G. whether she lied to J.G. and her mother about whether she had touched petitioner's penis and, if she denied it, call J.G. and Mikkelson to impeach her with what J.G. told Mikkelson during the forensic interview (1 H.C.R. 137; AX 12 at 1:20:40-1:21:33).

3. An.G.

An.G. testified that petitioner had sexually abused her since she was nine years old, including every time she stayed at his house (3 R.R. 166-68, 177). However, Michelle asserted in her witness statement to the police that she asked the girls "every now and then if anyone has ever touched them," and they always said no. Her statement recounted, "We had even asked them a couple of weeks prior if anyone had touched them and they said no" (1 H.C.R. 141). Madrid did not ask An.G. whether she told her mother repeatedly during this time frame that no one had ever

touched her and, if she denied it, call Michelle to impeach her.[11]

Mikkelson asked An.G. during the forensic interview what made her decide to tell (1 H.C.R. 143; AX 15 at 1:24:04). She said, "I didn't. My cousins [Ab.G.] and [J.G.] did because he did it to them too" (1 H.C.R. 143; AX 15 at 1:24:07). Mikkelson asked how An.G. found that out (1 H.C.R. 143; AX 15 at 1:24:22). An.G. said, "My mom . . . kept on calling them and telling them" (1 H.C.R. 143; AX 15 at 1:24:26). Madrid did not ask An.G. whether her mother kept calling and telling Ab.G. and J.G. (or their parents) that petitioner had sexually abused them and, if An.G. denied it, call Mikkelson to impeach her.

4. Au.G.

Au.G. testified that she told her parents that petitioner touched her with his hand while she was on the bed watching television at his house (3 R.R. 221, 226, 229, 231). However, Michelle asserted in her written statement that Au.G. had repeatedly denied that anyone had touched her—the last time being two weeks before the outcry (1 H.C.R. 141). Madrid did not

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[11] The logical question for Madrid to ask An.G. would have been whether she had lied or told the truth to her mother on those occasions. If she responded that she had lied, Madrid could argue that the jury could not believe beyond a reasonable doubt the testimony of a child who claimed that she had lied to her mother for years.

ask Au.G. about this prior inconsistent statement and, if she denied it, call Michelle to impeach her.

5. K.C.

Elmo testified that, in the summer of 2012, K.C. called and wanted to come home early from vacation Bible school because she was scared, so he picked her up and took her home (3 R.R. 69-70). K.C. testified that she called her father and asked him to pick her up because petitioner had touched her "middle part" outside her clothes while she was waking up in bed (4 R.R. 70-76). However, Michelle asserted in her written statement to the police that, after K.C. called and asked to come home, and Elmo picked her up, "she was acting fine and never said anything that caused concern" (1 H.C.R. 141). Madrid did not ask Elmo whether K.C. was acting fine and never said anything that caused concern after he picked her up and, if he denied it, call Michelle to impeach him.

During the forensic interview, Mikkelson asked K.C. to identify the first adult whom she had told that petitioner had touched her middle part (1 H.C.R. 144; AX 16 at 2:19:12). K.C. responded, "I think [An.G.] told them and then they went to my Uncle Jay's house because I was staying there and . . . **my dad told me and then I said yes** and then they took me back home and then Michelle recorded me and that's all I know" (1 H.C.R. 144; AX 16 at 2:19:23) (emphasis added). Mikkelson asked what made her decide not to tell her dad (1 H.C.R. 144; AX 16 at 2:19:51). She said that she

"had forgotten all about it that time because it was like last year" (1 H.C.R. 144; AX 16 at 2:20:03). Madrid asked K.C. whether her father asked her, "Did he touch you?" (4 R.R. 81-82). K.C. said yes (4 R.R. 82). Thus, the jury was left with the impression that Elmo merely had "asked" K.C. whether petitioner touched her and did not know that, in fact, he had "told" K.C. that petitioner touched her. Madrid did not ask K.C. about this prior inconsistent statement and, if she denied it, call Mikkelson to impeach her.

6. Diana Estrada

Estrada testified that petitioner touched her breasts and tried to touch her vagina at the restaurant when Cindy was in the area (4 R.R. 189). However, she asserted in her written statement (made the month before trial) that, when Cindy was present, "he would act like a church man but when she was not around he would talk real nasty and grab the other female employees and always talk about sex. He would grab me on my butt and on my breasts" (1 H.C.R. 91). She also detailed their consensual sexual relationship that occurred outside Cindy's presence (1 H.C.R. 91).

The State convinced the court to admit Estrada's testimony that petitioner had engaged in sexual contact with her at the restaurant when Cindy was in the area to show the probability that he would engage in similar conduct with the complainants even though Cindy was in the area (4 R.R. 186-89). Obviously, a prosecutor "woodshedded" Estrada before she testified

to add the detail that Cindy was in the area when Cano would engage in this conduct to ensure that the court admitted Estrada's testimony. Madrid should have informed the court outside the presence of the jury that Estrada asserted in her written statement that the conduct took place outside Cindy's presence in an effort to exclude her testimony. If the court admitted it anyway, he should have impeached Estrada with her prior inconsistent statement.

Madrid performed deficiently in failing to impeach the key prosecution witnesses with their prior inconsistent statements. *Cf. Ex parte Saenz*, 491 S.W.3d 819, 829 (Tex. Crim. App. 2016) (counsel ineffective in failing to impeach key prosecution witness with prior inconsistent statement); *Beltran v. Cockrell*, 294 F.3d 730, 734-35 (5th Cir. 2002) (counsel ineffective in failing to impeach eyewitness with prior tentative identification of another person as the murderer). No sound strategy could justify these significant omissions.

Reis asserted in the State's brief that Madrid would have risked creating sympathy had he attempted to impeach the complainants and Estrada (1 H.C.R. 199-200). Madrid repeated this response in his affidavit (1 H.C.R. 217-18).[12] The trial court found that it could not second guess Madrid's strategic decision not to impeach prosecution witnesses for fear of "incurring the jury's ire" (1 H.C.R. 248).

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[12] Madrid's excuse for not impeaching the complainants does not explain his failure to impeach Estrada, an adult.

If Madrid failed to impeach the complainants because he was afraid that the jury would be sympathetic toward them—as he claimed in his affidavit—he should not defend persons charged with sex offenses against children. Competent counsel informs the jury panel of his duty to cross-examine children and challenge for cause any venireperson who could not be fair to the defendant if counsel were to impeach a child. Competent counsel recognizes and accepts this challenge; incompetent counsel fabricates an excuse for his failure to provide effective representation.

B. Counsel Failed To Call A Psychologist To Testify That The Parents Engaged In Leading And Suggestive Questioning That Led The Complainants To Accuse Petitioner Of Sexual Abuse.

Madrid asked the jury panel during the voir dire examination how they would expect the State to prove the elements of the offense (2 R.R. 139-40). A venireperson responded, "Well, I think a child psychologist would have to be involved" (2 R.R. 140). At least this venireperson understood the necessity for expert testimony in cases of this nature.

Corporal Guajardo testified that, after she watched the forensic interviews of the complainants, she filed charges because she believed that "there was enough to corroborate the children's outcries of sexual abuse" (3 R.R. 13). Mikkelson testified that she saw no indication of deception or coaching, as the complainants'

stories were consistent with the summaries of the allegations that she had received (3 R.R. 149-51). Madrid did not consult with and call an expert to contradict Mikkelson and explain how leading and suggestive questioning can affect the reliability of a child's accusations. Clearly, Madrid recognized this defensive issue, as the theme of his closing argument was that Melody had overreacted when J.G. said that she saw petitioner's penis and that Michelle had scared An.G. and Au.G. by getting angry, crying, and asking whether petitioner had touched them, which caused them to go along with her and say yes (4 R.R. 224-25).

Habeas counsel hired Stephen Thorne, Ph.D., a psychologist, to review the evidence and provide his opinion on whether Madrid should have hired an expert to evaluate the case, suggest questions to ask on cross-examination and, if necessary, testify. Thorne read the police report, witness statements, and district attorney's summaries and watched the videotaped forensic interviews of the complainants. He provided an affidavit that, in his opinion, the complainants were subjected to leading and suggestive questioning by their parents that had the potential to contaminate their accusations of sexual abuse (1 H.C.R. 146-53).

Dr. Thorne found it significant that Ab.G. initially denied that she saw petitioner's penis but, when her mother, Melody, said, "God does not like it for people to lie," she changed her story and accused petitioner of sexual abuse; that David called Michelle and said that petitioner had molested his daughters and

that he was concerned that petitioner may have molested her daughters; that Michelle asked An.G. and Au.G. whether petitioner had touched them, and they said yes; that Michelle called Elmo and told him to ask K.C. whether petitioner had molested her; and, that Elmo told K.C. that petitioner did, and she said yes (1 H.C.R. 148-52). Thorne could have explained to the jury how leading and suggestive questions by adults—especially perceived authority figures such as parents—could have contaminated the complainants' statements about and reported memory of the alleged sexual abuse, and that Mikkelson did not follow the best-practice guidelines during the forensic interviews (1 H.C.R. 152). Thorne would have been available to testify at trial to the opinions expressed in his affidavit and would have suggested questions for Madrid to ask the parents, the complainants, and Mikkelson.

Keith Hampton, an experienced criminal defense lawyer in Texas, provided an affidavit expressing his opinion that defense counsel cannot fulfill his constitutional obligation to provide effective assistance in cases where young children are the primary source of an accusation of abuse without introducing expert testimony regarding child perception and memory (1 H.C.R. 164-65).[13] He concluded:

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[13] Hampton recently obtained the exoneration of Greg Kelley, who was wrongly convicted of super aggravated sexual assault of a child in Williamson County, after he presented expert testimony in the habeas proceeding that the complainant had been subjected to leading and suggestive questioning that resulted in

> Only an expert can explain how the interview techniques and other suggestive influences can generate false memories in children. It takes an expert in the social science to explain the effects of leading questions on a suggestible child, interviewer bias, and 'stereotype-induction.' Without benefit of expertise, jurors will not know what behavioral science has discovered (1 H.C.R. 165).

Madrid performed deficiently in failing to consult with and call a psychologist to testify that the parents had engaged in leading and suggestive questioning that had the potential to contaminate the complainants' accusations of sexual abuse. *See Wright v. State*, 223 S.W.3d 36, 44-45 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) (counsel was ineffective in failing to consult an expert regarding possible diversion from the standard protocol for interviewing a child about alleged sexual abuse where a therapist's notes indicated that the child's mother may have suggested there was sexual abuse before the child made an outcry, to support the defense theory of fabrication based on undue influence); *Mullins v. State*, 46 P.3d 1222, 1226 (Kan. App. 2002) (counsel was ineffective in failing to consult with an expert regarding interview techniques in a child sexual abuse case). *Cf. Ex parte Briggs*, 187 S.W.3d 458, 469 (Tex. Crim. App. 2005) (counsel was ineffective in failing to retain a doctor to review the evidence regarding the cause of death before advising the

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a false accusation (1 H.C.R. 164). This case is the subject of the documentary, "Outcry," which recently aired on Showtime.

defendant to plead guilty to injury to a child); *Ex parte Overton*, 444 S.W.3d 632, 640-41 (Tex. Crim. App. 2014) (counsel was ineffective in failing to call a doctor to testify regarding sodium intoxication in a case involving the death of a four-year-old child). No sound strategy could justify this significant omission.

Reis asserted in the State's brief that Madrid was not ineffective because no Texas caselaw requires trial counsel to call an expert in a child sex case (1 H.C.R. 201-03). Madrid repeated this response in his affidavit (1 H.C.R. 218-19). The trial court found that Madrid did not perform deficiently in the absence of controlling Texas caselaw (1 H.C.R. 248-49).[14]

This Court has held in a different context that trial counsel performed deficiently by failing to utilize a competent ballistics expert when necessary to defend against a criminal charge. *Hinton v. Alabama*, 571 U.S. 263, 274-75 (2014) (*per curiam*) (counsel failed to call a ballistics expert due to his erroneous understanding that state funding was limited). Counsel's duty to consult with and call an expert is not limited to any particular type of case or issue.

This is an important issue, as counsel's duty to consult with and call an expert depends on the necessity for the testimony without regard to the nature of the charge. Petitioner presented Hampton's uncontradicted affidavit that competent counsel would not try a child sex case without consulting with an expert when

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[14] The trial court ignored *Wright*, which is directly on point. *Wright*, 223 S.W.3d at 44-45.

there is an issue regarding whether the outcry was the result of leading and suggestive questioning by a parent. Madrid did not need a Texas case to explain that duty to him but, if he did, *Wright* had been decided eight years before petitioner's trial.

C. Counsel's Deficient Performance Resulted In Prejudice.

The verdict depended on whether the jury believed the complainants beyond a reasonable doubt. The defense theory was that Melody had overreacted when J.G. said that she saw petitioner's privates; suggested to J.G. and Ab.G. that sexual abuse occurred; set the wheels in motion for the other parents to suggest to their daughters that petitioner had sexually abused them; and, the dominoes toppled from there.

Madrid failed to impeach the complainants with their prior inconsistent statements regarding critical aspects of their testimony and failed to explore with the complainants, their parents, and Mikkelson that the parents had suggested that petitioner sexually abused the complainants before they made the accusations—a subject that Mikkelson did not explore during the forensic interviews. Additionally, Madrid failed to call an expert, such as Dr. Thorne, to explain how the parents led the complainants to make the accusations of sexual abuse through leading and suggestive questioning and how Mikkelson did not follow up on any of the complainants' statements during their interviews

that would have called into question the validity of their accusations.

Madrid's failure to elicit critical impeachment and expert testimony "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). His errors made the State's case significantly more persuasive while making the defense's case significantly less persuasive, which is the hallmark of prejudice. *See id*. at 695-96 ("Some errors will . . . alter [] the evidentiary picture.").

Although the TCCA's summary disposition of petitioner's substantial ineffective assistance of counsel claim without any articulated legal analysis warrants a remand, Madrid's deficient performance and the resulting prejudice is so obvious from the record that a summary reversal on the merits is justified. *Cf*. *Porter v. McCollum*, 558 U.S. 30 (2009) (*per curiam*) (deficient performance and prejudice resulted in a summary reversal).

II. The State Courts Denied Petitioner Procedural Due Process By Rejecting His Substantial Ineffective Assistance Of Counsel Claim Without Conducting An Evidentiary Hearing, Particularly In View Of The Fact That Trial Counsel's Affidavit Was Prepared In Collusion With The Prosecutor.

Madrid refused to answer undersigned counsel's written questions about the case after counsel notified him that, if he had strategic reasons for the acts and omissions in question, and counsel was persuaded that his strategies were sound, counsel would reject the case (1 H.C.R. 120). Thus, petitioner filed a state habeas corpus application alleging that Madrid was ineffective without knowing how he would respond. Petitioner filed a motion for an evidentiary hearing, which emphasized that it would be unfair for the trial court to believe Madrid's affidavit without providing an opportunity for cross-examination (1 H.C.R. 170). Nonetheless, even though petitioner raised a substantial ineffective assistance of counsel claim, the trial court ordered Madrid to file an affidavit (1 H.C.R. 173).

Having observed Madrid during the trial, Reis was not about to take a chance on Madrid's ability to prepare an affidavit on his own that would be sufficient to defeat the allegations of ineffectiveness. Reis surreptitiously sent Madrid the State's answer—which suggested possible strategic reasons for the challenged acts and omissions—and suggested that Madrid "may wish to review our response . . . before preparing your affidavit" (1 H.C.R. 188-205, 244).

Madrid filed an affidavit that virtually plagiarized Reis's suggested strategies as his own without attribution while omitting that they had colluded in preparing it (1 H.C.R. 210-19). Petitioner discovered their collusion through a state-law public information act request and again moved for a live evidentiary hearing (1 H.C.R. 230). The trial court refused to conduct an evidentiary hearing and relied on Madrid's affidavit—even though it was based on Reis's suggested explanations for the challenged acts and omissions—in making the findings of fact (1 H.C.R. 245-50). Petitioner filed objections that the TCCA should reject Madrid's affidavit as unreliable and grant habeas corpus relief or, in the alternative, remand for a live evidentiary hearing to provide him with an opportunity to cross-examine Madrid (2 H.C.R. 4).

The TCCA had no problem with Reis and Madrid cheating in order to win. Indeed, it denied relief without written order "on the findings of the trial court without a hearing and on the Court's independent review of the record" (App. 1-2). The state courts denied petitioner procedural due process by rejecting his substantial ineffective assistance of counsel claim without a live evidentiary hearing on the basis of Madrid's affidavit prepared in collusion with Reis.

Although the United States Constitution does not require the states to provide direct appeals or collateral review in criminal cases, those states that have integrated such post-conviction proceedings into their system must ensure that their procedures comport with the Due Process Clause of the Fourteenth Amendment.

See, e.g., *Evitts v. Lucey*, 469 U.S. 387, 393 (1985). Texas provides for collateral review of felony convictions resulting in a prison sentence pursuant to article 11.07 of its Code of Criminal Procedure. Therefore, the Due Process Clause of the Fourteenth Amendment applies to Texas habeas proceedings, just as it applies to state court direct appeals,[15] probation and parole revocation proceedings,[16] and driver's license revocation proceedings[17]—none of which is constitutionally required but, if provided by a state, must comport with due process.

As a practical matter, the state habeas corpus proceeding is the "main event" for prisoners like petitioner who contend that counsel provided ineffective assistance. It has become nearly impossible for state prisoners to obtain habeas corpus relief in federal court

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[15] *See Halbert v. Michigan*, 545 U.S. 605, 610 (2005) (Although "the Federal Constitution imposes on the States no obligation to provide appellate review of criminal convictions," "the Due Process and Equal Protection Clauses require the appointment of counsel for defendants, convicted on their pleas, who seek access to first-tier [appellate] review").

[16] *See Gagnon v. Scarpelli*, 411 U.S. 778, 783-91 (1973) (extending federal due process protections to probationers facing revocation); *Morrissey v. Brewer*, 408 U.S. 471, 481-89 (1972) (extending federal due process protections to parolees facing revocation).

[17] *See Bell v. Burson*, 402 U.S. 535, 539 (1971) ("Once [driver's] licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment.").

under the AEDPA's substantive and procedural barriers.[18]

This Court ultimately must determine whether a state's habeas procedures comport with the Due Process Clause of the Fourteenth Amendment. *See* Ahdout, *Direct Collateral Review*, 121 COLUM. L. REV. 160, 205-06 (2021) (observing that Supreme Court review is even more vital where state courts are so dismissive of habeas petitioners' federal constitutional claims that they do not even provide reasons for denying them). For decades, this Court has accepted that responsibility. *See Williams v. Pennsylvania*, 136 S. Ct. 1899, 1902 (2016) (state habeas petitioner was denied due process where a state supreme court judge—who, as the district attorney, had approved a request to seek the death penalty—refused to recuse himself from the state appellate proceeding); *Commonwealth of Pennsylvania ex rel. Herman v. Claudy*, 350 U.S. 116, 123 (1956) ("Under the allegations here petitioner is entitled to relief if he can prove his charges. He cannot be denied a hearing merely because the allegations of his petition were contradicted by the prosecuting officers."); *Wilde v. Wyoming*, 362 U.S. 607, 607 (1960) (*per curiam*) ("It does not appear from the record that an adequate hearing on these allegations was held in the District Court, or any hearing of any nature in, or by direction of, the Supreme Court. We find nothing in our examination of

[18] Petitioner cannot seek federal habeas relief because his AEDPA deadline expired before he retained counsel to file the state habeas application.

the record to justify the denial of hearing on these allegations.").[19]

This Court has held that procedural due process entitles a welfare recipient to a live evidentiary hearing—as opposed to a "paper" hearing by affidavits—in order to offer evidence and cross-examine the witnesses before benefits are revoked. *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970); *Wheeler v. Montgomery*, 397 U.S. 280, 281-82 (1970). If a welfare recipient has a due process right to a live evidentiary hearing before benefits are revoked, surely a prisoner with a substantial ineffective assistance of counsel claim has the same right—especially when the prosecutor secretly influenced the content of trial counsel's affidavit in order to defeat the claim, and the affidavit misleadingly suggested that it was based on counsel's file and the trial record.

An epidemic is raging against the Due Process Clause in Texas post-conviction habeas corpus cases. The Fifth Circuit is powerless to stop it, as the AEDPA standard of review has all but eliminated federal habeas corpus relief for state prisoners. Only this Court

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[19] *See also Cash v. Culver*, 358 U.S. 633, 637-38 (1959); *Palmer v. Ashe*, 342 U.S. 134, 137-38 (1951); *Jennings v. Illinois*, 342 U.S. 104, 111-12 (1951); *Rice v. Olson*, 324 U.S. 786, 791-92 (1945); *Tomkins v. Missouri*, 323 U.S. 485, 488-89 (1945); *Williams v. Kaiser*, 323 U.S. 471, 478-79 (1945); *Pyle v. Kansas*, 317 U.S. 213, 215-16 (1942); *Cochran v. Kansas*, 316 U.S. 255, 257-58 (1942); *Smith v. O'Grady*, 312 U.S. 329, 333-34 (1941).

can eradicate it by granting certiorari to review state habeas cases.[20]

Texas courts have consistently denied procedural due process to habeas applicants by resolving controverted fact issues by affidavits instead of at a live evidentiary hearing (which, inevitably, means that the trial court believes the lawyer instead of the applicant, as in petitioner's cases). The inadequate review of petitioner's substantial ineffective assistance of counsel claim violated due process—particularly considering that the Sixth Amendment right to the effective assistance of counsel is the "foundation for our adversary system." *Martinez v. Ryan*, 566 U.S. 1, 12 (2012). At the very least, this Court should remand the case to the Texas courts to conduct a live evidentiary hearing.

Review is warranted because the state courts denied petitioner procedural due process by rejecting his

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[20] Certiorari petitions raising procedural due process claims in Texas post-conviction habeas proceedings are pending in *Rene v. Texas*, No. 20-1798 (docketed June 25, 2021) (whether the TCCA violated procedural due process by rejecting without explanation a trial court's favorable, dispositive findings of fact that were based on witness credibility determinations following an evidentiary hearing); *Jackson v. Texas*, No. 21-41 (docketed July 13, 2021) (whether the TCCA violated procedural due process by summarily denying a substantial ineffective assistance of counsel claim without requiring the trial court to make meaningful findings of fact and without articulating any legal analysis); and *Howard v. Texas*, No. 21-225 (docketed August 16, 2021) (whether the TCCA violated procedural due process by summarily denying a substantial ineffective assistance of counsel claim without conducting an evidentiary hearing where the state habeas trial judge did not preside at the prior proceedings).

substantial ineffective assistance of counsel claim without conducting a live evidentiary hearing on the basis of trial counsel's affidavit prepared in collusion with the prosecutor. SUP. CT. R. 10(c).

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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