Supreme Court, U.S.
FILED
AUG 30 2021
OFFICE OF THE CLERK

No. 21-5561

In the Supreme Court of the United States

October Term 2021

TYRONE CADE,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition for Writ of Certiorari
To the Court of Criminal Appeals of Texas

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Whether the Fourteenth Amendment's Due Process Clause requires a State to provide capital habeas petitioners one opportunity to present Sixth Amendment ineffectiveness claims through competent counsel where state law promises those petitioners that they "shall be represented by competent counsel" in the only proceedings in which they can raise ineffectiveness claims.

CORPORATE DISCLOSURE STATEMENT

Petitioner Tyrone Cade is a death-sentenced Texas inmate. He was the applicant in the Texas Court of Criminal Appeals. Respondent is the State of Texas.

LIST OF PROCEEDINGS

State v. Cade, No. F-11-33962-R (265th District Court of Dallas County, August 29, 2012) (conviction of capital murder and sentence of death at trial);

Cade v. State, 2015 WL 832421 (affirming conviction and sentence on direct appeal);

Cade v. Texas, No. 15-6119, 136 S. Ct. 894 (2016) (denial of petition for certiorari);

Ex parte Cade, No. WR-83,274-01-3, 2017 WL 4803782 (Tex. Crim. App. Oct. 25, 2017) (denying state post-conviction relief);

Cade v. Lumpkin, No. 17-CV-3396 (N.D. Tex. Aug. 19, 2020) (District Court granted stay and abeyance of federal habeas proceedings);

Ex parte Cade, WR-83,274-03 (Tex. Crim. App. Mar. 31, 2021) (dismissal of subsequent state habeas writ application).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Tyrone Cade respectfully prays that a writ of certiorari issue to review the decision of the Court of Criminal Appeals of Texas dismissing his application for a writ of habeas corpus.

LOWER COURTS' OPINIONS AND ORDERS

The March 31, 2021, order of the Texas Court of Criminal Appeals under review is unreported and appended hereto at App. 1a-4a.

BASIS FOR JURISDICTION

The Texas Court of Criminal Appeals issued its order on March 31, 2021. App.-4a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Fourteenth Amendment provides, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

INTRODUCTION

Tyrone Cade seeks a modest remedy: When a State that channels Sixth Amendment claims to collateral proceedings and, by explicit mandatory language, gives a Sixth Amendment claimant the right to competent legal representation in those collateral proceedings, the State must be willing to consider the merits of a Sixth Amendment claim the first time it is presented by competent counsel. In its briefing to this Court in *Trevino v. Thaler*, "Texas submit[ed] that its courts should be permitted, in the first instance, to decide the merits" of the ineffective-assistance-of-trial-counsel claim that the petitioner's counsel forfeited in initial-review collateral proceedings. 569 U.S. 413, 429 (2013). Mr. Cade similarly argues that his Sixth Amendment ineffectiveness claims—forfeited due to the incompetence of his state habeas counsel—should receive merits review from the Texas Court of Criminal Appeals ("TCCA"). But where Texas asserts a prudential interest, Mr. Cade also asserts his right to a remedy from the deprivation of "liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment." *Vitek v. Jones*, 445 U.S. 480, 488 (1980).

Texas and Mr. Cade are not alone in recognizing that the States maintain an interest in having the first opportunity to decide the merits of Sixth Amendment claims that were forfeited by ineffective or incompetent state habeas counsel. *See, e.g., Brown v. McDaniel*, 130 Nev. 565, 575, 331 P.3d 867, 874 (Nev. 2014). Mr. Cade is not alone in recognizing that States have an obligation to consider such claims. Some state courts of last resort have held that fundamental fairness requires consid-

eration of second-in-time post-conviction applications that are the prisoner's first opportunity to present a Sixth Amendment ineffectiveness claim through competent counsel.[1] But the TCCA has held that the "competency of prior habeas counsel is not a cognizable issue" under the provision of Texas law that permits review of untimely claims under a variety of other circumstances. *Ex parte Graves*, 70 S.W.3d 103, 105 (Tex. Crim. App. 2002).

While state courts have the final say on state law requirements, the Fourteenth Amendment's "[Due Process] Clause imposes procedural limitations on a State's power to take away protected entitlements," including the state-created entitlement to collateral review procedures. *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 67 (2009). Having recognized in *Osborne* that state post-conviction procedures create constitutionally protected interests—even when those proceedings are not enforcing the Constitution—this Court should apply that principle to the specific, but recurring circumstances presented here.

Mr. Cade asks for nothing more than what Texas committed to by statute: A process ensuring "that a death row inmate does have one full and fair opportunity to present his constitutional or jurisdictional claims in accordance with the procedures of [Texas's capital habeas] statute." *Ex parte Kerr*, 64 S.W.3d 414, 419 (Tex. Crim. App. 2002). A ruling in Mr. Cade's favor streamlines the review of his claims. State-

[1] *See, e.g., State v. Davis*, 295 So.3d 396, 398 (La. 2020) (Johnson, C.J., concurring); *Allison v. State*, 914 N.W.2d 866, 883-84 (Iowa 2018); *Close v. People*, 180 P.3d 1015 (Colo. 2008); *In re Clark*, 5 Cal.4th 750, 779, 859 P.2d 729, 748 (Cal. 1993).

court review of whether Mr. Cade had competent representation could obviate federal-court review of whether state habeas counsel were ineffective under *Trevino*. State-court review of counsel's competence or merits review could eliminate from this case issues being considered in *Shinn v. Ramirez*, No. 20-1009.

Mr. Cade has already asserted in the District Court that his claims are fundamentally different from those counsel presented in his initial state application, and that the decision on the previous claims did not adjudicate the merits of the present claims. 2nd Amend. Petn. (ECF No. 127) at 95-96; *see Cullen v. Pinholster*, 563 U.S. 170, 187 n.10, 187 n.11 (2011);[2] *id.* at 214-16 (Sotomayor, J., dissenting). Mr. Cade also has asserted that if *Pinholster* bars his new evidence—as the District Court said before current counsel presented that evidence to the state court, App. 15a—then the relitigation bar should be treated the same as a procedural bar. ECF No. 127 at 96-97; *see Gallow v. Cooper*, 570 U.S. 933 (2013) (statement of Breyer, J., respecting denial of *certiorari*); *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 7-8 (1992) ("[I]t is ... irrational to distinguish between failing to properly assert a federal claim in state court and failing in state court to properly develop such a claim").[3] A ruling from this Court requiring Texas to perform its self-imposed duty of providing one opportunity for merits review of Sixth Amendment claims presented through competent counsel could

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[2] The question whether, under § 2254(d) and *Pinholster* 563 U.S. 170 (2011), a federal habeas petitioner may present evidence of a prosecutor's racially discriminatory intent in support of a *Batson* claim where the evidence was not available to the petitioner during state court *Batson* proceedings has been presented to this Court in *Broadnax v. Lumpkin*, No. 21-267 (cert. pet'n. docketed Aug. 20, 2021).

[3] The Fifth Circuit has rejected a version of the argument described in *Gallow*. *Escamilla v. Stephens*, 749 F.3d 380, 395 (5th Cir. 2014).

eliminate entirely—and would surely eliminate in part—the federal courts' need to address these issues.

Mr. Cade's "principal interest, of course, is in obtaining speedy federal relief on his claims." *Rose v. Lundy*, 459 U.S. 509, 520 (1982). Due to their inexperience, lack of supervision, and the need to manage large caseloads under the time constraints of Texas's limitations period, Mr. Cade's state habeas counsel failed to recognize that Texas law gave him a complete defense to capital murder, to eligibility for the death penalty, and a powerful mitigating circumstance, *viz.* unconsciousness at the time of the killings. The exhaustion doctrine that compelled Mr. Cade's return to the TCCA is "a judicially crafted instrument which reflects a careful balance between important interests of federalism and the need to preserve the writ of habeas corpus as a swift and imperative remedy in all cases of illegal restraint or confinement." *Braden v. 30th Judicial Circuit of Kentucky*, 410 U.S. 484, 490 (1973) (internal quotation marks omitted). But where States shirk their constitutional duty not to take away protected entitlements—here the right to competent representation—without any procedural safeguards, the exhaustion doctrine sends cases on a meandering course of delay and injustice that harms the interests of prisoners and society. This Court should grant review here to put Texas capital habeas cases back on course.

STATEMENT OF THE CASE

I. Background Facts

A. Trial Facts

In the early morning hours of March 27, 2011, Tyrone Cade's longtime partner, Mischell Fuller jostled him in bed to stop him from tossing and turning beside her. Mr. Cade then stabbed Ms. Fuller to death with a knife she kept under the mattress. Ms. Fuller's adult daughter, Desareé Hoskins, came to her mother's aid, and Mr. Cade then stabbed her to death.

Hours later, Mr. Cade went to the police station, called 9-1-1 from a pay phone outside, and tearfully told the operator that he had killed two people. Police arrested Mr. Cade and he confessed. He told police he had spent hours in the house with the victims. He prepared to kill himself by dropping an electric leaf blower in the bathtub he was in. Hab. App.[4] 2704, 2707 2933, 2939, 2942, 2956. He left the house and came back repeatedly, thinking it had been a dream. Hab. App. 2714. He turned over pictures, as Ms. Fuller had done with pictures of him whenever she was angry at him. Hab. App. 2705-06, 2926-28, 2930-32, 2939. Mr. Cade spoke obsessively about his status as a sex offender and his fixation on what other people said he had done. Hab. App. 2702-03, 2709-2710, 2713, 2929, 2931, 2940, 2944, 2955.

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[4] Citations to "Hab. App.," refer to the appendix to Mr. Cade's federal and state habeas petitions. "Hab. R. App." refers to the appendix to Mr. Cade's reply in federal court, which also was submitted to the TCCA. "Suppl. Hab. App." and "2nd Suppl. Hab. App." refer to the supplemental and second supplemental appendices Mr. Cade filed in state and federal court. These appendices are consecutively paginated. Citations to "CR" and "RR" refer to the clerk's record of filings, and the reporter's record of transcripts from the trial, respectively.

Prior to trial—indeed, prior to receiving an expert evaluation of Mr. Cade's mental condition—defense counsel served notice that they would pursue a defense of not guilty by reason of insanity ("NGRI"). CR 69. Then a psychologist defense counsel retained to evaluate Mr. Cade for the NGRI defense reported that he did not find Mr. Cade was insane at the time of the killings. Hab. App. 704. Then the psychiatrist defense counsel retained to evaluate Mr. Cade for NGRI reported that she did not find him insane at the time of the killings. Hab. App. 700-01. Then another psychologist reached the same conclusion. Hab. App. 703.

Defense counsel also retained a neuropsychologist who, among other things, administered a Personality Assessment Inventory ("PAI") to Mr. Cade. The PAI indicated psychosis, depression, and suicidal thoughts. "Specifically he scores high on three subscales of the PAI associated with psychosis including two subscales related to paranoia and one related to thought disorder." Hab. App. 6429. But the neuropsychologist did not testify at trial.

Defense counsel retained another psychologist, Dr. Gilda Kessner, and, this time, did not have her evaluate Mr. Cade. Instead, defense counsel described Mr. Cade to the expert and posed hypothetical questions regarding whether the person they described was sane. The expert said she could say the hypothetical person could have been insane at the time of the offense, but she couldn't say that person was Mr. Cade. 48 RR 12-13. That testimony was the centerpiece of the NGRI defense.

The other main witness for the defense was Gregory Scott, Mr. Cade's half-brother. He testified that in his opinion, Mr. Cade had a severe mental defect, and he

did not know that what he was doing was wrong when he stabbed the victims. 46 RR 131-133. Mr. Scott conceded that he was not present at the offense, and he therefore had no observations that would support his opinion about Mr. Cade's mental state at that time; Mr. Scott also conceded that he had no training in psychology or mental health. *Id.* at 101, 125. The trial court initially ruled Scott's opinion was not "rationally based on the perception of the witnesses and helpful to a clear understanding of the witness testimony in determination of a fact in issue." *Id.* at 104-105. But the State withdrew its objection, and Mr. Scott was permitted to testify.

Dr. Kessner testified after Mr. Scott. Initially, the trial court excluded her testimony because it was unreliable, and she did not display enough familiarity with the relevant facts. 48 RR 34. But, again, the State withdrew its objection.

Dr. Kessner testified that the hypothetical person described by defense counsel would have been in a state of "abandonment rage" which she described as "an uncontrolled emotion" originating from traumatic experiences in early childhood that causes a person to be unable to regulate his feelings and go into a rage when he senses that the person he depends on is going to leave him.[5] Dr. Kessner stated that she formed her opinion from review of the report of the State's expert, Dr. Tim Proctor;

[5] Dr. Kessner explained that during abandonment rage, a person experiences "intense autonomic arousal," and the rational portion of the brain ceases to function. Dr. Kessner testified that someone with Mr. Cade's background and stressors "would have a high probability of having a mental defect or disease," and "because of the intense emotional state and the autonomic arousal would not at the moment of the violence know that their conduct was wrong." 48 RR 39-40, 47.

the State's enumerated aggravating factors; writings that Mr. Cade made immediately after the offense; relevant literature; and discussions with the defense attorneys. Dr. Kessner testified she could not actually conclude whether Mr. Cade was insane because she had not evaluated him. In addition, counsel offered two additional experts—Dr. Daniel Altman and Dr. Michael Gottlieb—neither of whom had evaluated Mr. Cade or could offer any direct insight about him.[6]

The jury convicted Mr. Cade of capital murder.

In the trial's penalty phase, the State presented evidence of prior offenses, such as a conviction for evading arrest, 49 RR 154-57, a conviction for driving with license suspended, *id.* at 160, and an alleged 1993 incident involving Mr. Cade's cousin, who was arrested and proceeded to allege an assault by Mr. Cade after the same cousin had pistol-whipped Mr. Cade, *id.* at 127-28.

The defense published to the jury two previously admitted exhibits containing Mr. Cade's education records. 50 RR 55. Counsel also played the deposition of Mr. Cade's father, Jerry Cade Ford. *Id.* at 56 (In the liability phase, the jury heard excerpts from it). Mr. Cade's father, who had spent much of his adult life in and out of mental hospitals, told the jury he didn't "know much about Tyrone." DX2A at 34. Next, counsel called six witnesses in short succession, only three of whom knew Mr.

[6] Psychologist Dr. Daniel Altman testified briefly regarding Mr. Cade's father's mental illness and the heritability of schizophrenia but had no information specific to Tyrone himself. 46 RR 134-44. Psychologist Dr. Michael Gottlieb testified in general about the possible side effects of childhood sexual abuse. But he had not interviewed Mr. Cade nor reviewed any of his records and acknowledged that he could not identify a specific type or symptom of maltreatment or neglect that he may have been able to identify through an evaluation. 46 RR 58-60; 47 RR 61-63.

Cade: a co-worker, 50 RR 60-67; a former teammate who'd played football with Mr. Cade from age six through high school, 51 RR 13-22; Mr. Cade's maternal cousin, who testified that she grew up with him and they "didn't have a really good childhood," 51 RR 32-33.

As part of their preparation for the NGRI defense, Mr. Cade's trial counsel had him evaluated by a neuropsychologist prior to trial. 47 RR 42; 2 SHRR 227. Her testimony was excluded from the guilt-innocence phase, and counsel did not call her for the penalty phase. *See* 47 RR 89-128 (proffer for appeal). In the proffer of her testimony for appellate purposes, trial counsel elicited that she found Mr. Cade had borderline intelligence, 47 RR 95 (full-scale IQ of 80), had sleep problems, was remorseful, depressed, and had symptoms of PTSD, *id.* at 95-97.

B. Post-conviction Facts

Texas law requires that any indigent death-sentenced person who wants counsel for collateral review "shall be represented by competent counsel." Tex. Code Crim. Proc. art. 11.071, § 2(a). Mr. Cade did not waive that right, so the trial court duly appointed the Office of Collateral Writs, now called the Office of Capital and Forensic Writs ("OCFW"), the state agency created to provide competent capital post-conviction representation. According to the current director of OCFW, the attorneys assigned to Mr. Cade's case were only sixteen months out of law school, had no professional experience, and were not competent to undertake Mr. Cade's representation. 2nd Supp. Hab. App. 6920. Their lack of experience was exacerbated by overwhelming caseloads, lack of supervision, and poor management. *Id.* at 6920-21.

The director of OCFW at the time Mr. Cade's state habeas application had to be prepared restricted access to mental health experts for clients whose trial attorneys had the client evaluated. 2nd Supp. Hab. App. 6915-21; Hab. R. App. 6784; Hab. R. App. 6788-6789; Hab. R. App. 6793. Although Mr. Cade's attorneys could see he was mentally impaired, and requested professional evaluations, their supervising director denied those requests. Hab. R. App. 6784; Hab. R. App. 6794; Hab. R. App. 6788.

The first claim OCFW asserted on Mr. Cade's behalf was that trial counsel had performed deficiently for presenting the NGRI defense, causing prejudice in Mr. Cade's sentencing. OCFW asserted that giving notice of the defense before any expert evaluations, then proceeding after evaluations produced no expert who had examined Mr. Cade and found that he was insane, was objectively unreasonable. OCFW alleged those actions "caused [trial counsel] to lose credibility with the jury and harmed their presentation of mitigating evidence at the punishment phase," 1st St. Hab. Appl. 31, an allegation that was like the trial defense because it was unsupported by proof.

OCFW also presented claims asserting that Mr. Cade's trial counsel had been ineffective in their preparation for, and presentation of, the penalty phase defense. Those claims were not supported by mental health evidence developed by OCFW, but the agency presented a psychiatrist to testify at the hearing the state court held on the penalty-phase claims. *Id.* at 44-76, 82-85.

The TCCA rejected Mr. Cade's claims, and Mr. Cade moved for the appointment of federal habeas counsel pursuant to 18 U.S.C. § 3599(a).

Federal habeas counsel investigated Mr. Cade's background, including his health history, which included a heightened risk of developing schizophrenia due to his father having the disease, lifelong sleep disorders beginning with nocturnal enuresis (or "bed wetting," an indicator for neurological problems identified *infra*) and carrying on to multiple reported incidents in adulthood of nocturnal motor activity, traumatic exposure to domestic violence—including when he was a child, his father, commanded Tyrone to fetch a hammer, whereupon his father attempted to murder his mother in front of Tyrone—roughly twelve years of playing tackle football beginning when Mr. Cade was about six years old, and myoclonic jerks, tiny, transient muscle spasms that are indicative of neurological problems.

A psychiatrist, a psychologist specializing in trauma, and a neurologist examined Mr. Cade and reviewed his confession and the evidence of his behavior before, during, and after the stabbings. They concluded that Mr. Cade has auditory hallucinations consistent with schizophrenia, has multiple symptoms of Post-Traumatic Stress Disorder—including re-experiencing past traumatic events—a sleep disorder, and likely brain damage (Chronic Traumatic Encephalopathy) from countless concussive and subconcussive head injuries. *See* Hab. App. 6419-27 (report of Dr. Behk Bradley, Ph.D.); Hab. App. 6485, 6500-02, 6528-29 (Decl. Jeff Victoroff, M.D.); Hab. App. 6559-60 (Decl. Bhushan S. Agharkar, M.D.)

Regarding the stabbings themselves, Mr. Cade's medical condition—in particular, his sleep disorder, PTSD, and long history of head trauma—and the circumstances of his actions, were consistent with a phenomenon called confusional arousal

with violence in which a sleeping person is aroused and suddenly attacks another, often their intimate partner. Hab. App. 6514-15 (Cade's circumstances are "[e]xactly consistent with case reports of murder of bed partners due to confusional arousal dating back to the Renaissance, and [] [e]xactly consistent with ... published characteristic traits observed across multiple cases of confusional arousal with violence"). Because the aroused person is not conscious, the phenomenon gives rise to a defense.

An early Texas case, for example, had facts similar to Mr. Cade's. The defendant, who was living with his lover (the decedent), learned of threats made by an "enemy," became "alarm[ed]" at the possibility of "a secret attack" while they slept, and thus went to bed with a pistol under his pillow. *Bradley v. State,* 277 S.W. 147, 148 (Tex. Crim. App. 1925). After falling asleep, the defendant was "disturbed by a noise" and before he was "reconciled" he "jumped up with [his] gun and commenced shooting." *Ibid.* His lover was dead. *Ibid.* The defendant testified that "I couldn't say I killed her because I didn't know what I was doing." *Ibid.*

The TCCA found that "writings of medical and medico-legal authors contain accounts of many well-authenticated cases in which homicides have been committed while the perpetrator was either asleep or just being aroused from sleep, and . . . there are very many cases in which the confused thoughts of awakening consciousness have led to disastrous consequences." 277 S.W. at 149 (quoting *Fain v. Commonwealth,* 78 Ky. 183, 187 (1879)). The court held that a defendant was entitled to have the jury instructed that if the defendant acted "while asleep, and not knowing what he was

doing, or if you have a reasonable doubt thereof," the jury should acquit the defendant. *Id.* at 148. The failure to give that instruction is prejudicial. *Id.* at 150.

With the findings of the neurologist, psychiatrist, and psychologist, Mr. Cade's federal habeas counsel pled that his trial counsel were ineffective for failing to investigate and thereby develop the available unconsciousness defense instead of the NGRI defense that their repeated efforts with experts established was moribund. In contrast to the allegation that the unsupported NGRI defense prejudiced Mr. Cade in the penalty phase, Mr. Cade's federal-court claim asserted he was prejudiced in the guilt-innocence phase. Mr. Cade's unconsciousness and mental condition at the time of the offense would have rebutted the State's evidence of specific intent—an essential element of capital murder in Texas—and raised at least a reasonable doubt about whether he possessed the mental state for capital murder under Tex. Penal Code § 19.03. *See* Tex. Penal Code § 6.02; *Jackson v. State*, 160 S.W.3d 568, 574 (Tex. Crim. App. 2005); *Mendenhall v. State*, 77 S.W.3d 815, 818 (Tex. Crim. App. 2002) (one "'who engages in what would otherwise be criminal conduct is not guilty of a crime if he does so in a state of unconsciousness or semi-consciousness'") (quoting W. LaFave & A. Scott, *Substantive Criminal Law* § 4.9 (1986)); Tex. Code Crim. Proc. art. 38.36(a). In addition, this evidence could provide a defense that Mr. Cade did not act voluntarily. *Rogers v. State*, 105 S.W.3d 630, 638 (Tex. Crim. App. 2003); *accord* Model Penal Code 2.01(b); 2 LaFave, *Substantive Criminal Law* § 9.4.

Although the evidence was there for OCFW to find, OCFW filed Mr. Cade's only litigation as of right regarding whether he received effective assistance of counsel without investigating whether he had a mental condition that could have supported a defense or mitigated the offenses. Hab. R. App. 6783; Hab. R. App. 6786-6790; Hab. R. App. 6793-6795; 2nd Supp. Hab. App. 6921 ("no investigation at all was done into how Mr. Cade's impairments may have affected his behavior at the time of the killings or served as mitigating circumstances."). Counsel were not even aware that Texas law provided for a defense based on the facts. Hab. R. App. 6785; Hab. R. App. 6795.

In federal court, Mr. Cade sought a stay under *Rhines v. Weber*, 544 U.S. 269 (2005), so that he could present the TCCA, *inter alia*, with claims of ineffective assistance of counsel at the liability and penalty phases of trial based on the evidence that he was not conscious at the time of the offense. The district court granted a stay, instructing Mr. Cade to present all of his federally pleaded claims to the TCCA.

In his subsequent application, Mr. Cade asserted that OCFW had not provided competent representation or investigated his case expeditiously, as Texas law required. He argued that the Due Process Clause gave him a right to merits review of his claims because state law gave him a liberty interest in competent, expeditious post-conviction representation, and OCFW had arbitrarily denied him those services during his initial state-habeas proceedings.

II. Procedural History

Mr. Cade pleaded not guilty to a charge of capital multiple murder entered in the 265th District Court of Dallas County, Texas, in Cause No. F-11-33962-R. After

a jury trial at which Mr. Cade did not testify, the jury found him guilty on August 24, 2012. A penalty hearing was held before the same jury and, on August 29, 2012, the jury sentenced Mr. Cade to death.

Mr. Cade had an automatic appeal to the TCCA in Cause No. AP-76,883. The TCCA affirmed on February 25, 2015. *Cade v. State*, 2015 WL 832421. Mr. Cade's timely petition for writ of certiorari was denied on January 19, 2016. *Cade v. Texas*, No. 15-6119, 136 S. Ct. 894 (2016).

On September 12, 2012, pursuant to Tex. Code Crim. Proc. art. 11.071, § 2(c), the trial court appointed the Office of Capital Writs (now, OCFW). On September 9, 2014, Mr. Cade timely filed an application for a writ of habeas corpus in the TCCA, which was given Cause No. WR-83,274.

On February 25, 2015, OCFW filed a motion to amend Mr. Cade's application, then withdrew the motion on March 11, 2015, before filing a subsequent application on April 20, 2015.

After an evidentiary hearing, the trial court adopted *verbatim* the State's proposed findings of fact and conclusions of law supporting denial, which were later adopted, with minor alterations, by the TCCA in an order that also dismissed the subsequent application. *Ex parte Cade*, 2017 WL 4803782 (Tex. Crim. App. Oct. 25, 2017).

On December 21, 2017, the District Court for the Northern District of Texas appointed counsel for Mr. Cade pursuant to 18 U.S.C. § 3599. On October 25, 2018,

Mr. Cade filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Mr. Cade amended his federal petition on March 28, 2019.

Before the conclusion of the pleading phase, on December 18, 2019, Mr. Cade moved the district court for a stay and abatement of federal proceedings so that he could exhaust state court remedies for five claims. Texas opposed the motion.

On July 2, 2020, the magistrate judge recommended the district judge order Mr. Cade to file in the TCCA all claims pending in the amended federal petition, regardless of whether they were unexhausted. App. 25a-26a.

On August 19, 2020, over Mr. Cade's objection to the magistrate judge's recommendation that Mr. Cade be ordered to refile exhausted claims, the district judge adopted the magistrate judge's recommendation and ordered Mr. Cade to file in state court all claims he wanted the federal court to consider. App. 10a.

On October 19, 2020, Mr. Cade filed a subsequent application for a writ of habeas corpus which the trial court transferred to the TCCA. On March 31, 2021, the TCCA dismissed the application based on Tex. Code Crim. Proc. art. 11.071, § 5. App. 4a.

REASONS FOR ALLOWING THE WRIT

I. The Lack of Guidance from this Court on a State's Responsibilities and Immunities when it Saddles a Sixth Amendment Claimant with Incompetent Counsel has Produced Disparate Results

At least where no constitutional right is at stake, a State's postconviction review procedures violate a prisoner's right to due process "only if [the State's procedures] are fundamentally inadequate to vindicate the substantive rights provided." *Osborne*, 557 U.S. at 69. Texas easily meets this test by providing a substantive right to competent, expeditious representation in capital collateral proceedings, permitting a death-sentenced person to be heard only through his appointed counsel, imposing onerous time and substantive pleading requirements, precluding amendment or supplementation of an initial application, then holding that the incompetence of appointed counsel is "not a cognizable issue" when applying the State's law for reviewing untimely Sixth Amendment claims. *Graves*, 70 S.W.3d at 105.

Osborne involved a non-capital prisoner's access to scientific testing that the prisoner hoped would support relief based on newly discovered evidence. 557 U.S. at 73-74. In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court rejected a proposal that prisoners who raise Sixth Amendment ineffectiveness claims should have to satisfy the "cause and prejudice" test for unpreserved claims. 466 U.S. at 697. Because "[a]n ineffectiveness claim ... is an attack on the fundamental fairness of the proceeding whose result is challenged," this Court held that "[t]he principles governing ineffectiveness claims should apply in federal collateral proceedings as they do on direct appeal or in motions for a new trial." *Ibid.*

In *Martinez v. Ryan*, 566 U.S. 1 (2011), this Court reaffirmed the central importance of enforcing the Sixth Amendment right to effective assistance in collateral proceedings, when it modified the cause/prejudice doctrine primarily because "the 'right to the effective assistance of counsel at trial is a bedrock principle in our justice system.... Indeed, the right to counsel is the foundation for our adversary system.'" *Trevino*, 569 U.S. at 422 (quoting *Martinez*, 566 U.S. at 12).

Carrying forward *Strickland*'s recognition that ineffectiveness claims should be entitled to the same process any claim would receive in a motion for new trial or on direct appeal, Mr. Cade also prevails under the three-part weighing test for proceedings involving constitutional rights. *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985). Concerning "the private interest that will be affected by the action," or, in this case, inaction "of the State," *ibid.*, this Court has said that "the 'right to the effective assistance of counsel at trial is a bedrock principle in our justice system... Indeed, the right to counsel is the foundation for our adversary system.'" *Trevino,* 569 U.S. at 422 (quoting *Martinez,* 561 U.S. at 12 ("A prisoner's inability to present a claim of trial error is of particular concern when the claim is one of ineffective assistance of counsel.").

That interest, and the process due to protect it, stands in stark contrast with a death-sentenced person's interest in raising a claim he is incompetent to be executed. By its very nature, such a claim arises only in a procedural posture like Mr. Cade's, *i.e.*, only after initial-review collateral proceedings. *Panetti v. Quarterman,* 551 U.S. 930, 946 (2007). An incompetence-for-execution claim asks "not *whether,* but *when,* [the petitioner's] execution may take place. This question is important, but it

is not comparable to the antecedent question whether petitioner should be executed at all." *Ford v. Wainwright*, 477 U.S. 399, 425 (1986) (Powell, J., concurring) (emphasis in original).

In contrast to a claim under *Ford*, "[a]n ineffectiveness claim ... is an attack on the fundamental fairness of the proceeding whose result is challenged." *Strickland*, 466 U.S. at 697. Mr. Cade's claims ask whether he should have been convicted, found to be a future danger, or selected for a death sentence; more precisely, whether the process leading to those determinations comported with fundamental fairness. "Since fundamental fairness is the central concern of the writ of habeas corpus," *ibid.*, Mr. Cade's interest here is entitled to greater protection than the interest at stake in *Panetti*. And yet, in Mr. Cade's initial-review collateral proceeding, incompetent state counsel denied him the very same thing Mr. Panetti was unconstitutionally denied in his post-warrant proceeding, *viz.* expert assistance necessary to substantiate his substantive constitutional claims. *See Panetti*, 551 U.S. at 950.

With regard to the State's interests, *Ake*, 470 U.S. at 77, as Texas itself asserted in *Trevino*, the State has an interest in conducting the first merits review of Mr. Cade's competently developed claims. Suppose Mr. Cade receives merits review in state court. In that case, Texas can assert the TCCA's decision should receive deference under 28 U.S.C. § 2254(d), rather than the de novo review Mr. Cade will receive in federal court under *Trevino*.

Texas has already accepted the burdens of providing competent counsel, and subsequent-review collateral proceedings. This Court has long held that when due

process requires a State to provide representation, "the State bear[s] the risk of constitutionally deficient assistance of counsel." *Kimmelman v. Morrison*, 477 U.S. 365, 379 (1985); *see also Evitts v. Lucey*, 469 U.S. 387, 396 (1985) ("The constitutional mandate is addressed to the action of the State in obtaining a criminal conviction through a procedure that fails to meet the standards of due process of law.").

Texas also recognizes the probable value of providing counsel in capital collateral proceedings. *See Ake*, 470 U.S. at 77. Texas channels Sixth Amendment ineffectiveness claims to collateral review by making it "virtually impossible" to litigate the issue on direct appeal. *Trevino*, 569 U.S. at 423. Texas places a time limit on that review. Tex. Code Crim. Proc. art. 11.071, § 4(a).

Texas statutes implicitly recognize that, due to the extra-record bases for habeas claims, complying with that time limit requires the immediate appointment of competent counsels who must "investigate expeditiously." *Id.* § 3(a). But when the state agency charged with representing death-sentenced prisoners like Mr. Cade fails to provide competent counsel, the TCCA holds that failure is "not cognizable" under the provision of Texas law that permits review of untimely claims under a variety of other circumstances, Tex. Code Crim. Proc. art. 11.071, § 5(a)(1), such as when the State suppressed evidence.[7] That bait-and-switch is fundamentally unfair, and this Court's due process cases do not allow it to continue.

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[7] *See, e.g.*, *Ex parte Landor*, No. WR-81,579-02, 2020 WL 469979, (Tex. Crim. App. Jan. 29, 2020) (unpublished) (authorizing successive proceedings on claim that State withheld *Brady* evidence); *Ex parte Reed*, No. WR-50,961-10, 2019 WL 6114891, (Tex. Crim. App. Nov. 15, 2019) (unpublished) (authorizing successive proceedings on *Brady*, false testimony, and actual innocence claims); *Ex parte Temple*,

Correcting the TCCA's error regarding the Due Process Clause's requirements when States fail to deliver on entitlements will have two desirable effects. First, it will answer an open legal question that has produced disparate results in different States. Some States have found procedural mechanisms for reaching the merits of

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No. WR-78,545-02, 2016 WL 6903758 (Tex. Crim. App. Nov. 23, 2016) (unpublished) (granting relief on basis that State's failure to timely disclose police reports to defendant constituted *Brady* violation); *Ex parte Murphy*, No. WR-38,198-04, 2015 WL 5936938 (Tex. Crim. App. Oct. 12, 2015) (unpublished) (staying applicant's execution to consider authorization of successive proceedings on *Brady* claim that State failed to disclose threats of prosecution and promises of leniency to its two main witnesses and on claim that State unknowingly presented false testimony through one witness); *Ex parte Tercero*, No. WR-62,592-04, 2015 WL 5157211 (Tex. Crim. App. Aug. 25, 2015) (unpublished) (authorizing successive proceedings on claim that State presented false testimony); *Ex parte Carty*, No. WR-61,055-02, 2015 WL 831586 (Tex. Crim. App. Feb. 25, 2015) (unpublished) (authorizing successive proceedings on claim that State coerced witnesses into providing false testimony and that State did not disclose deal with co-defendant); *Ex parte Brown*, No. WR-68,876-01, 2014 WL 5745499, Tex. Crim. App. Nov. 5, 2014) (unpublished) (vacating applicant's conviction and sentence on basis that the State withheld *Brady* evidence); *Ex Parte Tiede*, 448 S.W.3d 456 (Mem.) (Tex. Crim. App. 2014) (granting applicant relief on basis of the State's use of false evidence); *Ex parte Lave*, Nos. WR-44564-03, WR 44564-04, 2013 WL 1449749 (Tex. Crim. App. April 10, 2013) (unpublished) (authorizing successive proceedings on claim that State presented false expert testimony); *Ex parte Bower*, No. WR-21005-02, 2012 WL 2133701 (Tex. Crim. App. June 13, 2012) (unpublished) (authorizing subsequent habeas application following forensic testing on *Brady* claim); *Ex parte Wyatt*, No. AP-76797, 2012 WL 1647004 (Tex. Crim. App. May 9, 2012) (unpublished) (authorizing successive petition and granting relief on four items of exculpatory evidence suppressed by the State that would have supported the defense's theory of misidentification); *Ex parte Miles*, 359 S.W.3d 647 (Tex. Crim. App. 2012) (authorizing subsequent petition and granting relief on *Brady* claim that State failed to produce police reports which identified other potential suspects); *Ex parte Settle*, No. AP-76591, 2011 WL 2586406 (Tex. Crim. App. June 29, 2011) (unpublished) (authorizing successive petition and granting relief on *Brady* claim).

forfeited or untimely *Strickland* claims,[8] or held that due process or fundamental fairness require a remedy for forfeiture-by-incompetent-counsel cases.[9]

Some state legislatures have expressly provided the remedy Mr. Cade seeks. *E.g.*, N.J. R. Ct. 3:22-4(b)(2)(c). Others have expressly barred a remedy for ineffective representation on collateral review. *E.g.*, N.C. Gen. Stat. 15A-1419(c). In other States like the *Brown* court in Nevada, and the TCCA, courts have held that the States'

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[8] *E.g.*, *Allison v. State*, 914 N.W.2d 866, 891 (Iowa 2018) ("filing of the second PCR petition relates back to the timing of the filing of the original PCR petition"); *Close v. People*, 180 P.3d 1015 (Colo. 2008) (district court must hold hearing on whether IAC of postconviction counsel excused filing of a successive motion filed outside the three-year statute of limitations for filing the motion); *In re Clark*, 5 Cal.4th 750, 779, 859 P.2d 729, 748 (Cal. 1993) ("In limited circumstances, consideration may be given to a claim that prior habeas corpus counsel did not competently represent a petitioner.").

[9] *E.g.*, *Clark*, 5 Cal.4th at 780, 859 P.2d at 748 ("Regardless of whether a constitutional right to counsel exists, a petitioner who is represented by counsel when a petition for writ of habeas corpus is filed has a right to assume that counsel is competent and is presenting all potentially meritorious claims."); *Close*, 180 P.3d at 1019 ("[T]he overriding concern [is] that defendants have a meaningful opportunity to challenge their convictions as required by due process."); *Newland v. Comm'r of Correction*, 331 Conn. 546, 560, 206 A.3d 176, 184 (2019) ("[T]he protections afforded by the procedural default rule must be construed in light of the fundamental role of the right to counsel in ensuring a fair trial and the importance of providing habeas relief from the unfairness that results from the complete deprivation of counsel"); *State v. Davis*, 295 So.3d 396, 398 (La. 2020) (Johnson, C.J., concurring) ("To find that retained or appointed counsel is not obligated to provide effective assistance because state post-conviction proceedings are somehow beyond the reach of the Sixth Amendment would offend basic and fundamental principles of justice. This is particularly so when counsel's ineffectiveness in post-conviction proceedings means that trial counsel's performance will never be reviewed. The poor performances of two attorneys do not cancel each other out. Rather they magnify the potential for injustice."); *Menzies v. Galetka*, 150 P.3d 480, 508 (Utah 2006) (Utah Supreme Court finding appellate counsel's gross negligence sufficient to warrant Rule 60(b) relief because "when an attorney is grossly negligent ... the judicial system loses credibility as well as the appearance of fairness, if the result is that an innocent party is forced to suffer drastic consequences.") (internal citations omitted).

collateral review statute does not permit review under those circumstances. *Graves*, 70 S.W.3d at 105 ("competency of prior habeas counsel is not a cognizable issue on habeas corpus review").[10]

Second, requiring that States who promise competent representation to Sixth Amendment claimants actually deliver that representation in a proceeding that reaches the merits of Sixth Amendment claims will reduce burdens on federal habeas courts. When a state court must reach the merits of a Sixth Amendment claim the first time it is presented by competent counsel, federal courts will not have to contend with complex issues like those being considered in *Shinn v. Ramirez*, No. 20-1009. In affected States, the need for federal habeas courts to address the still unresolved issue of when the relitigation bar of 28 U.S.C. § 2254(d) does not apply because a claim has been fundamentally altered. *Cullen v. Pinholster*, 563 U.S. 170, 187 n.10, 187 n.11 (2011); *id.* at 214-16 (Sotomayor, J., dissenting), and whether to treat the relitigation bar differently than other functionally equivalent bars to de novo federal review, *see Gallow v. Cooper*, 570 U.S. 933 (2013) (statement of Breyer, J., respecting denial of *certiorari*). The latter two issues have been raised in Mr. Cade's case. *See* App. 15a.

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[10] Texas provides a limited remedy if state habeas counsel files *nothing* cognizable within the statutory time limit. Tex. Code Crim. Proc. art. 11.071, § 4A; *Ex parte Medina*, 31 S.W.3d 633, 641 (Tex. Crim. App. 2011). But that remedy is unavailable if the appointed attorney files *anything* cognizable. *See Ex parte Graves*, 70 S.W.3d 103, 120 (Price, J., dissenting) (observing that under the rule announced by the majority, "a habeas applicant has no recourse for the appointment of less-than-competent counsel, unless counsel fails to file an application or files a document that does not constitute an application.").

II. Tyrone Cade Had a Protected Liberty Interest in Competent, Expeditious Habeas Representation

Under this Court's cases, state laws create protected liberty interests when two conditions are met. First, the state statute must "contain 'explicit mandatory language,'" such that if the law's "substantive predicates are present, a particular outcome must follow." *Kentucky Dep't of Corr. v. Thompson*, 490 U.S. 454, 463 (1989); *see also Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 756 (2005) ("Our cases recognize that a benefit is not a protected entitlement if government officials may grant or deny it in their discretion."). Second, to have a protected interest "in a benefit, a person clearly must have more than an abstract need or desire for it." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). Texas law plainly satisfies both conditions.

Texas law explicitly requires that a death-sentenced person pursuing habeas corpus review "shall be represented by competent counsel." Tex. Code Crim. Proc. art. 11.071, § 2(a). Unless the defendant opts out of the law's default requirement of counsel, *ibid.*, Texas law requires the trial court to appoint capital habeas counsel upon finding "the defendant is indigent." *Id.* § 2(b). If those two conditions are satisfied—the defendant is indigent and did not affirmatively elect not to have counsel—the trial court has no discretion, it "shall appoint the office of capital and forensic writs," the attorneys who represented Mr. Cade, "or other competent counsel." *Id.* § 2(c); *id.* § 2(f). The statute is so emphatic about requiring "competent counsel" that it repeats

the adjectival phrase three times in the context of initial-review collateral proceedings, *id.* §§ 2(a), 2(c), and 2(f), and again in the context of court-authorized proceedings on subsequent applications, *id.* § 6(b-1)(3).

Texas law emphasizes the mandatory and urgent need for competent representation in capital collateral proceedings by explicitly requiring speed by those to whom the statute provides instructions. The trial court "shall" determine the defendant's indigency and desire for counsel "immediately after judgment is entered." *Id.* § 2(a). Texas law then instructs capital collateral counsel that "[o]n appointment, counsel shall investigate expeditiously, before and after the appellate record is filed in the court of criminal appeals, the factual and legal grounds for the filing of an application for a writ of habeas corpus." *Id.* § 3(a).

Once the trial court appoints counsel, the rights of a death-sentenced person like Mr. Cade are entirely in the lawyer's hands. Texas law proscribes "hybrid representation under Article 11.071" such that a Texas habeas court will refuse to consider *pro se* filings by a death-sentenced person even when his appointed counsel is violating his fiduciary and statutory duties. *Ex parte Medina*, 361 S.W.3d 633, 637 (Tex. Crim. App. 2011). Death-sentenced habeas applicants have tried to complain that their lawyers violated essential elements of the attorney-client relationship such as competence and communication. But Texas courts refused to hear their complaints. *See, e.g., Green v. Davis*, 479 F. Supp. 3d 442, 452 (S.D. Tex. 2020) (describing how habeas petitioner "attempted multiple times to file his own habeas application pro se, but the trial court dismissed these attempts on the basis that Green was already

represented" by attorney who refused to communicate with him as "[s]ix years passed"); *see also* Texas Defender Service, *Lethal Indifference: The fatal combination of incompetent attorneys and unaccountable courts in Texas death penalty appeals*, Ch. 3 at 26 (describing rejection of one inmate's request for relief from incompetent counsel);[11] *id.* at 30 (describing intervention in *Graves*); *id.* at 32-33 (describing non-response to pleas about attorney incompetence in *Ex parte Martinez*, 977 S.W.2d 589 (Tex. Crim. App. 1998)). That is the logical, but unconstitutional, implication of the TCCA's holding that § 2(a) of Article 11.071 entitles death-sentenced habeas applicants to the *appointment* but not the *performance* of competent counsel. *Graves*, 70 S.W.3d at 114.

Just as interests protected by the Due Process Clause are created by state law, "their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Roth*, 408 U.S. at 577. Texas law justifies and explains Mr. Cade's liberty interest in competent, expeditious representation on collateral review. *See Trevino*, 569 U.S. at 425-27 (drawing on how the Texas bench and bar understood the requirements for developing and pleading a prima facie case of ineffective assistance citing such standards as the Texas Bar's *Guidelines and Standards for Texas Capital Counsel*, 69 Tex. B.J. 966 (2006)). "The structure and design of the Texas [legal] system in actual operation ... make it virtually impossible for an

[11] Available at https://www.texasdefender.org/wp-content/uploads/2019/12/Lethal-Indiff_web.pdf.

ineffective assistance claim to be presented on direct review." *Trevino*, 569 U.S. at 417 (internal quotation marks omitted).

In *Trevino* this Court found the timing of direct appeal proceedings made it virtually impossible to plead a Sixth Amendment claim on appeal in Texas. 569 U.S. at 424-25. Unlike non-capital cases, in which there is no statutory time limit on seeking habeas review of a felony conviction, *see* Tex. Code Crim. Proc. art. 11.07, Texas law requires that collateral review commence with the automatic appeal of a death judgment. Tex. Code Crim. Proc. art. 11.071, § 4(a). Sixth Amendment claims must be filed by "the 180th day after the date the convicting court appoints counsel ... or not later than the 45th day after the date the state's original brief is filed on direct appeal ... whichever date is later." *Ibid.*

That initial application must contain all claims. Texas law expressly provides that "[i]f an amended or supplemental application is not filed" within the time limit, "the court shall treat the application as" subject to strict statutory limits on second or successive applications. Tex. Code Crim. P. art. 11.071, § 5(f). The TCCA strictly construes that provision.[12]

The Texas *Guidelines and Standards* this Court cited in *Trevino*, 569 U.S. at 426, explain that habeas counsel's most basic duty is "to undertake the comprehensive extra-record investigation that habeas corpus demands." Guideline 12.2(B)(1)(a).

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[12] *See, e.g., Ex parte Jennings*, ___ S.W.3d ___, 2018 WL 2247764 at *1 (Tex. Crim. App. May 16, 2018); *Ex parte Eldridge*, 2005 WL 8154074 at *1 (Tex. Crim. App. Feb. 9, 2005); *see Ex parte Marshall*, 2014 WL 6462907 (Tex. Crim. App. Nov. 19, 2014); *Ex parte Ochoa*, 2009 WL 2525740 (Tex. Crim. App. Aug. 19, 2009).

They caution that counsel must "assume that any meritorious issue not contained in the first state application for writ of habeas corpus will be waived or procedurally defaulted." Guideline 12.2(B)(1)(e). Thus, the *Guidelines and Standards* echo the command of Article 11.071, § 3(a) when they press habeas counsel to "promptly obtain the investigative resources necessary," Guideline 12.2(B)(3)(a), and lay out a detailed list of areas that could require investigation, Guidelines 12.2(B)(3)-(5).

In sum, Texas procedural rules governing the presentation of Sixth Amendment claims make the statutory requirements of competence and expeditiousness essential for a death-sentenced inmate to meet the State's timing and pleading requirements. It is axiomatic that lawyers with less competence in an area of law will need more time to accomplish tasks, and the more complex the area of law, the more time it takes to acquire competence. *See* Model Rules of Prof. Conduct r. 1.1, cmt. 4 (Am. Bar Ass'n) ("A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person.").

Although Texas law explicitly required that Mr. Cade "shall be represented by competent counsel" and explicitly instructed his counsel "[o]n appointment" to "investigate expeditiously," counsel met neither requirement, and the TCCA deemed those failures non-cognizable under the same statute that imposed them.

III. Mr. Cade's State Habeas Counsel were Neither Competent, Nor Expeditious, Nor "Counsel" in any Meaningful Sense

A. Mr. Cade's Counsel were not Competent

Texas law defines competence for representation based on the specific "area of the law" in which the lawyer will be working. Tex. Disciplinary R. Prof. Conduct 1.01, cmt. 1.

> In determining whether a matter is beyond a lawyer's competence, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience in the field in question, the preparation and study the lawyer will be able to give the matter, and whether it is feasible either to refer the matter to or associate a lawyer of established competence in the field in question. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequences.

Id., cmt. 2.

The State Bar of Texas demonstrated its understanding that capital litigation is exceptionally complex and requires specialized knowledge, skill, and training when it adopted *Guidelines and Standards for Texas Capital Counsel* in 2006. The Texas Bar's understanding is shared by the American Bar Association, which first adopted *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* in 1989 and revised them in 2003. Both the Texas and ABA guidelines state their purpose is "to ensure high quality legal representation" for anyone facing the death penalty, not as a lofty aspiration, but because that is what competence requires in that area of practice. Texas Guideline 1.1.A. The ABA commentary explains that "to call for 'high quality legal representation' [is] to emphasize that, because of the extraordinary complexity and demands of capital cases, a significantly greater degree

of skill and experience on the part of defense counsel is required than in a noncapital case." ABA Guideline 1.1, in *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Revised ed. 2003,* 31 Hofstra L. Rev. 913, 921 (2003). Texas Guideline 4.1.B contains a long list of competencies.

From the start, Mr. Cade was not represented by competent counsel as those terms are defined in Texas law and practice. Jeremy Schepers and Joanne Heisey were directly responsible for investigating Mr. Cade's case during initial-review collateral proceedings under Article 11.071. Each had just graduated from law school. Hab. R. App. 6782 (Schepers); Hab. R. App. 6792 (Heisey). Neither had any experience as attorneys. *Ibid.*

According to the current director of OCFW, when Mr. Cade's lawyers filed his initial application, they were only sixteen months out of law school, had no professional experience, and were not competent to undertake Mr. Cade's representation. 2nd Supp. Hab. App. 6920. Their lack of experience was exacerbated by overwhelming caseloads, lack of supervision, and poor management. *Id.* at 6920-21.

Mr. Schepers and Ms. Heisey worked under the "supervision" of OCFW director Brad Levenson.[13] Hab. R. App. 6783. However, they describe that supervision as "negligible." *Id.* at 6973. As Mr. Schepers states, he "was responsible for all aspects of the litigation in the cases I was assigned to including managing the work of pre-

[13] Mr. Levenson himself was new to Texas criminal and habeas practice, having come from Los Angeles, California.

paring the petition, hands-on investigation, hiring and working with experts, directing the work of the OCFW investigators, drafting, editing, and filing pleadings, briefs, and other papers ...." *Id.* at 6783. Heisey shared that responsibility. Hab. R. App. 6792. They "were not paired with a more experienced attorney." *Ibid.*

While a lawyer may undertake representation for which she is not competent if the circumstances allow the lawyer to "become more competent in regard to relevant legal knowledge by additional study and investigation," Tex. Disciplinary R. Prof. Conduct 1.01, cmt. 4, the circumstances at OCFW did not allow Schepers and Heisey to develop the necessary competencies. They received neither formal or otherwise meaningful training or supervision from OCFW. Hab. App. 6782 (Schepers); Hab. R. App. 6793 (Heisey). And their caseloads made it impossible to spend sufficient time on study and investigation. Schepers carried six to fifteen cases while working on Mr. Cade's case. Hab. R. App. 6783. Heisey carried "a total of seven highly active state post-conviction cases" while also preparing Mr. Cade's application. Hab. R. App. 6972.

Texas rules entitled Mr. Cade to know that his counsel would not have the time or opportunity to acquire the training, skills, and knowledge necessary to competently represent him before his application came due under § 4 of Article 11.071. *See* Tex. Disciplinary R. Prof. Conduct 1.01, cmt. 4 ("If the additional study and preparation will result in unusual delay or expense to the client, the lawyer should not accept employment except with the informed consent of the client."). Yet, his counsel were not even aware of the defense Mr. Cade had available to him based on the facts. Hab.

R. App. 6785; Hab. R. App. 6795. *Cf. Hinton v. Alabama*, 571 U.S. 263, 274 (2014) ("An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*."). Mr. Cade was not informed of, and did not consent to, the incompetent representation.

B. Mr. Cade's Counsel did Not Investigate Expeditiously

Texas law "requires [habeas] counsel to investigate expeditiously the factual and legal grounds for an application." *Ex parte Mines*, 26 S.W.3d 910, 912 (Tex. Crim. App. 2000) (citing Tex. Code Crim. Proc. art. 11.071, § 3(a)). Although Mr. Schepers and Ms. Heisey recognized from the outset that Mr. Cade was mentally ill and had a history of physical head trauma, they did not investigate how his condition could support a defense. Hab. R. App. 6784-85; *id.* at 6794-95.

What stood in counsel's way was not a strategic decision, as that concept is understood in the law of agency, but a wholesale policy and practice of the OCFW director. Hab. R. App. 3793 (Heisey); *id.* at 6784 (Schepers). "This approach prevented meaningful analysis of [trial] counsel's actual performance." *Id.* at 3793. Although habeas counsel "believed at the time that Mr. Cade's mental illness played a role in his criminal behavior," and habeas counsel believed trial counsel acted unreasonably in presenting an insanity defense at trial, they could not secure funding to investigate whether a defense was available. *Id.* at 6785.

At the time, the director of the OCFW adhered to an "arbitrary" policy, contrary to his client's interests, that prevented Mr. Cade's lawyers from conducting a mental health investigation overwhelmingly indicated by the case and Mr. Cade's

background. 2nd Supp. Hab. App. 6917-20. The director also arbitrarily, as a matter of policy, refused to invoke Mr. Cade's statutory right to seek funding for experts from the courts. *Id.* at 6917. The director's policies were contrary to prevailing professional norms, the facts presented to him, and case law. *Id.* at 6919-20. The director would only authorize Mr. Cade's lawyers to retain a recently licensed neuropsychologist with a bogus credential to spend *one hour* of reviewing another clinician's work. *Id.* at 6918-19. The director also insisted Mr. Cade's lawyers file an expert affidavit that the lawyers believed would harm Mr. Cade's interests solely because the office had already paid for the expert's services. *Id.* at 6915-16. Taken together, the director's policies and practices placed his professional interest in appearing to be a guard of the public fisc ahead of Mr. Cade's interests. These policies and practices were contrary to Mr. Cade's interests and caused mental health evidence to be unavailable to Mr. Cade.

The wholesale refusal to investigate whether Mr. Cade's mental health problems were reasonably investigated during trial was only one of OCFW's failures to investigate. Due to insufficient staffing and high caseloads, OCFW "was not in a position" to conduct a professionally competent investigation of Mr. Cade's background. Hab. R. App. 6784. *See also id.* at 6796-97.

C. Mr. Cade's Counsel Breached their Fiduciary Duties

Section 4(e) of Article 11.071 codifies the traditional rule that a client, as the principle, is responsible for the errors of his lawyer/agent. *See Trevino*, 569 U.S. at 422. If an indigent, death-sentenced person does not expressly waive his right to representation in habeas proceedings, the appointment of counsel is mandatory. Tex.

Code Crim. Proc. art. 11.071, §§ 2(a) and (c). After that, Texas courts will only permit a death-sentenced person to be heard through counsel, even when the appointed lawyer refuses to perform his statutory duties. *See Medina, supra,* 361 S.W.3d at 637. Nevertheless, an attorney's "failure to file an application before the filing date applicable to the applicant under Subsection (a) or (b) constitutes a waiver of all grounds for relief that were available to the applicant before the last date on which an application could be timely filed, except as provided by Section 4A." Tex. Code Crim. Proc. art. 11.071, § 4(e).

However, this traditional rule gives way when the attorney violates her fiduciary duties and thereby severs the principal/agent relationship. *See Maples v. Thomas,* 565 U.S. 266 (2012) (cited in *Trevino,* 569 U.S. at 422.). Where the attorney's actions "severed the principal-agent relationship, an attorney no longer acts, or fails to act, as the client's representative," and "[h]is acts or omissions therefore cannot fairly be attributed to the client." *Maples,* 565 U.S. at 281 (internal quotation marks and citation omitted).

Under well-established principles of agency law, OCFW severed the principal-agent relationship. The *Maples* Court found the habeas petitioner did not bear the risk of his attorneys' failure to comply with an Alabama rule "requiring them to seek the trial court's permission to withdraw." 565 U.S. at 284. Under agency law "'it is ordinarily inferred that a principal does not intend an agent to do an illegal act.'"

Ibid. (quoting with omitted alteration 1 Restatement (Second) Agency § 111, Comment *b*). In at least two respects, OCFW violated the requirements of Texas law relevant to its appointment.

As explained *supra*, OCFW did not assign competent lawyers to Mr. Cade's case, did not provide guidance and supervision from a qualified senior lawyer, did not provide training, and burdened inexperienced counsel with caseloads and responsibilities that made it impossible for them to acquire competence in time for it to matter. OCFW also did not investigate expeditiously, or regarding Mr. Cade's evident mental and physical problems, in any meaningful way.

As Ms. Heisey and Mr. Schepers state, Director Levenson refused to pursue funding for experts and insisted on using expert reports even when doing so was contrary to the client's interests. Hab. R. App. 6794. Texas follows the traditional agency rule that when an attorney withholds necessary information from the client or places his own interests in conflict with his client's interests, he breaches his fiduciary duties. *See Gofney v. Rabson*, 56 S.W.3d 186, 193 & n.5 (Tex. App.--Houston 2001); *see also* Restatement (Second) of Agency § 112, Cmt. b (1958) ("Agents are appointed to forward the principal's interests, and when the agent ceases to do this and prefers his own or another's interests, ordinarily the principal no longer would desire the agent to act for him, and this the agent should realize."); Restatement (Second) of Agency § 387 (1958) ("Unless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency.").

OCFW breached its duty of candor to Mr. Cade by failing to inform him about

his attorneys' inexperience, lack of training, knowledge, skills, and inability to obtain relevant competencies while carrying out their many duties. OCFW breached its duty of loyalty to Mr. Cade by placing the agencies *perceived* interests in currying favor and preserving the standing of its director over the interests of clients. *See* Restatement (Second) of Agency § 387 (1958) ("Unless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency."); *id.* § 389 ("Unless otherwise agreed, an agent is subject to a duty not to deal with his principal as an adverse party in a transaction connected with his agency without the principal's knowledge.").

"'Common sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of the word.'" *Maples*, 565 U.S. at 282 (quoting *Holland v. Florida*, 560 U.S. 631, 659 (2010) (Alito, J., concurring)). By failing to assign competent counsel, failing to guide and supervise freshly (or not-yet) licensed lawyers, overburdening Mr. Cade's inexperienced counsel, failing to appoint necessary experts to investigate, and insisting on using experts counsel believed were harmful, OCFW was not operating as Mr. Cade's agent in any meaningful sense. Accordingly, the failures to present fully developed ineffective-assistance claims in Mr. Cade's initial application cannot be imputed to Mr. Cade. Those failures must be imputed to the State such that the factual bases for those claims were not available to Mr. Cade through the exercise of due diligence. *See* Tex. Code Crim. Proc. art. 11.071, § 5(a)(1).

IV. Review of this Case will Streamline the Federal Habeas Process, if Any is Necessary, and the Process in Other Texas Cases and Similar Jurisdictions

The federal district court must address multiple layers of complex procedural issues due to Texas's failure to meet its self-imposed responsibility of providing one merits ruling on competently presented Sixth Amendment claims. State counsel's failure to have Mr. Cade examined by mental health experts and their ignorance of Texas's unconsciousness defense led to paltry claims being presented in state court, and well-developed claims being presented in federal court. At a minimum, if the State does not waive a procedural-bar defense—as it arguably did during the initial round of pleading—the court will have to address Mr. Cade's contentions that *Trevino* allows de novo review of the merits. Mr. Cade has presented extensive evidence that may require live testimony.

It is possible, even likely, this Court's ruling in *Shinn v. Ramirez* will affect how the federal court proceeds to the merits.

The district court has suggested it might deem Mr. Cade's claims to have been adjudicated on the merits in initial habeas proceedings, such that Mr. Cade's new evidence is barred by *Pinholster, supra.* App. 15a. That will require a decision about whether the claims were "fundamentally altered," within the meaning of *Vasquez v. Hillery,* 474 U.S. 254, 261 (1986). If the district court decides the claims were not distinct, two things will happen: (1) Mr. Cade will assert the ineffectiveness of his state habeas counsel should overcome the relitigation bar just as it overcomes a procedural bar as Justice Breyer observed in *Gallow, supra.* (2) Mr. Cade will appeal on

the question of whether his new claims are distinct from those presented initially in state court.

Obviously, this Court has not resolved the issue in *Gallow*. The *Vasquez* standard is vague, and its application under *Pinholster* has prompted different opinions from the Fifth Circuit.[14] It is unnecessary to consider these issues in Mr. Cade's case. Texas committed by statute to providing review of Sixth Amendment claims presented through competent capital habeas counsel. Requiring the State to keep that commitment in this case properly apportions the burdens of ensuring the State observes the Constitutions requirements in its capital cases.

CONCLUSION

This Court should grant certiorari to resolve the important question presented.

Respectfully submitted,

Dated: August 30, 2021

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[14] Before *Pinholster*, the Fifth Circuit held that a federal claim was unexhausted if new evidence placed it in a "significantly different and stronger" position than a claim raised in state court. *E.g.*, *Kunkle v. Dretke*, 352 F.3d 980, 988 (5th Cir. 2003); *Ries v. Quarterman*, 522 F.3d 517, 525 (5th Cir. 2008) (by not mentioning allegedly deficient omission of trial counsel in state court, petitioner failed to exhaust claim). Since *Pinholster*, if the petitioner might be able to show cause for a procedural default, the Fifth Circuit has never found a claim to be unexhausted and therefore not adjudicated. *See Broadnax v. Lumpkin*, 987 F.3d 400, 407-410 (5th Cir. 2021).