No. 21-5561

IN THE

Supreme Court of the United States

TYRONE CADE,

Petitioner,

v.

TEXAS,

Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

A Texas jury found Tyrone Cade guilty of capital murder and answered the statutory special issues in a manner that required the trial court to sentence him to death. The Texas Court of Criminal Appeals (TCCA) affirmed Cade's conviction and sentence on direct appeal and denied his initial and first subsequent applications for habeas relief. After remand by the federal district court, Cade filed a second subsequent state habeas application, which the TCCA dismissed in accordance with Texas's abuse-of-the-writ statute. In his petition for certiorari review of the TCCA's dismissal order, Cade presents one question:

> Does a state's enactment of a statutory provision for initial capital-habeas applicants to be represented by "competent counsel" create a due process obligation for the state to recognize a claim of ineffective assistance of original habeas counsel as providing a pathway to subsequent habeas review of otherwise procedurally barred claims of trial-counsel ineffectiveness?

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BRIEF IN OPPOSITION

In March 2011, Petitioner Tyrone Cade murdered his girlfriend, Mischell Fuller, by stabbing her twenty-eight times in her bed. When Fuller's teenaged daughter, Desaree Hoskins, came to her mother's aid during the attack, Cade turned his knife on her, stabbing her thirty-nine times. Cade then sexually assaulted Fuller multiple times, both as she lay dying and after her death. Approximately sixteen hours after the murders, Cade went to a police station and called 911 from a pay phone in the lobby. He later gave video-recorded, detailed confessions to the murders of both women. Cade's confessions, along with handwritten notes he left at the crime scene, revealed the motive for the murders: Cade was angry and jealous over Fuller's recent rekindling of a romantic relationship with her ex-husband, Hoskins's father.

Against the backdrop of these undeniably horrific facts, and in keeping with their client's express wishes, Cade's trial counsel investigated and presented an insanity defense. After the jury rejected that defense and convicted Cade of capital murder, trial counsel presented a mitigation case highlighting Cade's family history of mental illness, his difficult childhood, and the trauma of a promising football career lost to injury. Ultimately, the jury decided the special issues in a manner requiring imposition of the death penalty.

As mandated by Texas law, the trial court appointed the Office of Capital Writs, now called the Office of Capital and Forensic Writs (OCFW)—a state agency created for the express and sole purpose of ensuring that death-sentenced prisoners

have access to competent counsel in state habeas proceedings—to prepare Cade's state writ application. The application OCFW filed on Cade's behalf raised, among sixteen claims for relief, eleven allegations of ineffective assistance of trial counsel (IATC) at the voir dire, guilt, and penalty phases of his trial. OCFW then filed a subsequent application, raising one additional IATC claim. After a five-day evidentiary hearing, the trial court recommended that Cade's claims in his initial application be denied. The TCCA agreed, denied relief on Cade's initial application, and dismissed his subsequent application as an abuse of the writ under Texas Code of Criminal Procedure article 11.071, section 5.

Cade then sought habeas relief in federal court, filing a petition in which he raised, among twenty claims for relief, eight allegations of IATC, three of which were unexhausted. After the district court stayed his federal habeas proceedings to permit exhaustion of state remedies on all of his federally pleaded claims—exhausted or not—Cade returned to state court and filed a second subsequent habeas application presenting, inter alia, his three unexhausted and five exhausted IATC claims. All of his IATC claims, Cade argued, qualified for subsequent habeas review under *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), because original state habeas counsel were ineffective in how they litigated trial counsel's effectiveness in the initial writ proceeding. The TCCA dismissed Cade's second subsequent application as an abuse of the writ under Texas Code of Criminal Procedure article 11.071, section 5, without considering the merits of any of his claims.

Cade now seeks certiorari review of the TCCA's state-law-grounded dismissal of his second subsequent writ application. He argues that because Texas law guarantees death-sentenced prisoners the right to "competent" counsel during their first state writ proceedings, due process requires the TCCA to recognize an exception to the statutory bar on subsequent writs for IATC claims either not presented or not adequately presented on initial habeas due to the alleged ineffective assistance of state habeas counsel (IAHC). In effect, he asks this Court to transform the narrow, equitable exception to federal-habeas procedural-default rules set out in *Martinez* and *Trevino* into a constitutionally mandated exception to the application of state procedural bars to untimely IATC claims in those states, like Texas, that grant habeas applicants a statutory right to representation by counsel on initial collateral review. The Court should deny Cade's petition because (1) the TCCA's dismissal of Cade's IATC claims rested on an independent and adequate state-law procedural ground that precludes certiorari review; (2) this case is a poor vehicle to reach the question raised because even if this Court were to recognize a due process right to the effective assistance of state-appointed counsel on initial collateral review, Cade's initial state habeas counsel performed effectively here, enabling the state courts to thoroughly examine and address trial counsel's effectiveness at both the guilt and punishment stages of the trial; and (3) Cade's attempt to extract a constitutional right from a legislative act of grace is unavailing and contrary to this Court's precedents.

STATEMENT OF THE CASE

I. Evidence Relating to Guilt

A. The murders

In its opinion on direct appeal, the TCCA summarized the evidence presented at Cade's trial regarding the murders of Fuller and Hoskins:

> The jury heard evidence that [Cade] and Mischell Fuller had been romantically involved for a number of years. They had also lived together in Fuller's house for several years. [Cade's] eleven[-]year-old daughter, Tyra Cade, and Fuller's seventeen-year-old daughter, Desaree Hoskins, lived with them. Desaree was Fuller's daughter with her ex-husband, Karlton Hoskins, who was in prison when Fuller and [Cade] began dating. Michael Hoskins, Fuller's older child with Karlton, lived in Denton.
>
> Although [Cade] was still living in Fuller's house at the time of the killings, their relationship had deteriorated due to various factors. One factor was Karlton's 2009 release from a Florida prison, after which he began to reestablish a relationship with Michael and Desaree. Fuller greatly encouraged Karlton's efforts. Although Karlton lived in Florida, he became a presence in Fuller's and the children's lives. [Cade], who was jealous and possessive of Fuller, disliked her contact with Karlton. He suspected Fuller of rekindling a romantic relationship with Karlton and told her that he did not want her ex-husband to call the house. Even before Karlton's renewed presence, Fuller had repeatedly asked [Cade] to move out. [Cade] refused, and after one such request made shortly before the killings, threatened to burn the house down with Fuller in it. Although Fuller and [Cade] still slept in the same bed, they had not been sexually intimate in several months.
>
> The killings occurred sometime in the early hours of March 27, 2011. Later that day, [Cade] turned himself in by calling 9–1–1 from a pay phone in a police station lobby. After receiving *Miranda* warnings, [Cade] gave officers video-recorded statements in which he confessed to the killings in detail. According to his statements, on the evening of March 26, 2011, he hid a recording device near Fuller's side of the bed, then went to a strip club with his cousin. After a few hours in the club, followed by an unsuccessful search for prostitutes, [Cade] returned to Fuller's house around 2:00 a.m. The recording device had captured a Skype conversation between Fuller and Karlton, and [Cade] listened to

it when he returned home. Roughly two hours into the recording, [Cade] heard the conversation become sexual in nature.

Soon thereafter, [Cade] got into bed with Fuller, who fell asleep but was later awakened by [Cade's] tossing and turning in bed. When Fuller told [Cade] to lie down and go to sleep, [Cade] showed Fuller a kitchen knife. Fuller began screaming when she saw the knife, and [Cade] repeatedly stabbed her. Fuller's screams woke Desaree, who ran into the bedroom to help her mother. [Cade] stabbed Desaree several times and then returned to Fuller. When Desaree started to get up, [Cade] stabbed her again multiple times as she screamed and attempted to crawl away from him. When Desaree stopped screaming and moving, [Cade] walked back to Fuller, who was still alive and conscious. [Cade] vaginally and anally raped Fuller, claiming that he ejaculated "[i]n her, on her, everywhere" because she made him feel like a sex offender. [Cade] believed Fuller lived for thirty to forty minutes after he first stabbed her, and he asserted that he sexually assaulted her for twenty to thirty minutes of that time. While he was sexually assaulting Fuller, [Cade] heard Desaree speaking. He believed that Desaree survived longer than Fuller.

Officers found Fuller's body in the master bedroom, face down and naked below the waist. Fuller's buttocks and vaginal area were propped up on several pillows; a bottle of lubricant lay next to her body. Desaree's body was in the hallway, immediately outside the bedroom. In a bathroom, officers found a bloody knife and notebook containing [Cade's] handwritten notes. [Cade] wrote that Fuller had "kicked [him] to the curb" when she began trying to mend the relationship between Karlton and her children. [Cade] also wrote that, because he could not live without Fuller, he took Fuller from himself and "from ... anyone else." Although he expressed remorse for the killings, [Cade] also frequently deflected responsibility away from himself, writing, for example, "[Fuller] used to treat me so good. Not like a sex offender"; "I'm truly sorry, she drove me crazy trying to fix things with her kids and the father"; "I feel bad for so many people, especially who knew ... [Fuller]. All I can say is she had a bad side .... It wasn't always sunshine"; and "Thank Karlton Hoskins for this one."

The medical examiner, Jill Urban, M.D., testified that Fuller died from being stabbed twenty-eight times. Urban found defensive wounds on Fuller's hands and wrists. Several wounds to Fuller's face, neck, and chest area were between four and five inches deep. Desaree's death resulted from thirty-nine stab wounds, many of which were also between four and five inches deep. Urban testified that the perpetrator

used a great deal of force in inflicting Desaree's injuries, noting that the wounds penetrated her bones.

Cade v. State, No. AP-76,883, 2015 WL 832421, at *1–2 (Tex. Crim. App. Feb. 25, 2015) (not designated for publication) (footnotes omitted), *cert. denied*, 577 U.S. 1105 (2016).

B. The insanity defense

The TCCA also summarized the evidence related to Cade's insanity defense:

> To support his insanity defense, [Cade] offered lay testimony from his half-brother, Gregory Scott. Scott asserted that [Cade] suffered from a severe mental defect and did not know his conduct was wrong when he killed Fuller and Desaree. Scott testified that he was four years older than [Cade] and lived with [Cade], their mother, and [Cade's] biological father, Jerry Cade Ford, until the age of six or seven. Scott, who asserted that he and [Cade] came from a "crazy bloodline," testified that Ford had mental problems. After the age of six or seven, Scott lived with his grandparents. He had minimal contact with [Cade] until they were both adults and their now-deceased mother became terminally ill. Scott testified that he and [Cade] had difficult childhoods because their mother and Ford frequently abused each other in front of them. According to Scott, [Cade] seemed different and emotionally unstable after serving a prison sentence for aggravated sexual assault. Scott also asserted that [Cade's] mental state at the time of the offense was unstable, primarily due to chronic back pain that [Cade] self-treated with pain patches. Scott admitted that he had disliked Fuller and that he had suggested that [Cade] place the recording device near her bed.
>
> [Cade] also presented testimony from three psychologists: Daniel Altman, Michael Gottlieb, and Gilda Kessner. Dr. Altman testified that he reviewed Ford's mental-health records, which showed that Ford had been diagnosed with schizophrenia and schizoaffective disorder. Altman told the jury that, based on heritability research and Ford's diagnoses, [Cade] had a 9–18% risk of developing the characteristics of schizophrenia or schizoaffective disorder. On cross-examination, Altman acknowledged that he did not examine or purport to diagnose [Cade] with schizophrenia or any other mental illness. He also stated that, in males, schizophrenia usually appears by a person's mid-twenties, and that it would be very unlikely for a thirty-eight-year-old male ([Cade's] age at the time of the offense) to spontaneously

develop schizophrenia. Moreover, according to Altman, the vast majority of people with mental illnesses, including schizophrenics, understand the difference between right and wrong.

Dr. Gottlieb testified that he learned through defense counsel of allegations that [Cade's] mother and cousins sexually abused [Cade] as a child. Gottlieb told the jury that some sexually abused children may develop psychological symptoms during adulthood. These symptoms can include internalizing and externalizing behavior, physiological symptoms, distorted perceptions as a result of their experiences, and other issues. However, the symptoms are nonspecific, meaning that they could originate from something entirely unrelated to the earlier abuse, and there is no causal link between the earlier abuse and a particular psychological difficulty, if any, that subsequently develops. On cross-examination, Gottlieb acknowledged that he received no independent corroboration that the alleged sexual abuse actually occurred. And because he did not examine [Cade] or review any of his records, Gottlieb also could not say whether [Cade] actually manifested any psychological symptoms that might be consistent with childhood sexual abuse. Gottlieb further agreed that individuals who have been abused as children and develop psychological symptoms as adults are usually still able to conform their behavior to societal norms. Gottlieb offered no opinion concerning whether [Cade] was insane at the time of the offense.

Defense counsel deposed [Cade's] father, Ford, in anticipation of [Cade's] capital-murder trial. Following Gottlieb's testimony, and in the jury's presence, counsel read a portion of Ford's deposition testimony into the record. In that excerpt, Ford asserted that he discovered [Cade's] mother performing fellatio on [Cade] when [Cade] was about two years old. Ford testified that he responded by hitting [Cade's] mother in the head with a hammer and stated that [Cade] witnessed him inflict the blow.

Dr. Kessner acknowledged that she worked exclusively for the defense in capital cases. Kessner testified about a mental condition she called "abandonment rage," which she acknowledged was not a diagnosis included in the American Psychiatric Association's Diagnostic and Statistical Manual. Kessner testified that a person experiencing "abandonment rage" exists in a state of autonomic arousal. She stated that such arousal limits cognitive processes and can cause an individual to lose control of his behavior. Kessner asserted that a person who is experiencing stressors such as depression, chronic pain, after-effects of childhood and adult trauma,

and the threat of losing an intimate partner would be more likely to enter a state of "abandonment rage" than a person not subject to such stressors. She also asserted that an individual experiencing "abandonment rage" would not know, at the moment of violence, that his conduct was wrong. Kessner testified that there was a high probability that [Cade] suffered from "abandonment rage." Kessner acknowledged, however, that she did not personally examine [Cade] in preparation for her testimony. Based on the information she reviewed, and after vacillating greatly, Kessner ultimately stated that i[t] was her opinion that [Cade] had a severe mental disease or defect at the time of the offense and did not know that his conduct was wrong.

In rebuttal, the State presented the testimony of Tim Proctor, Ph.D., a forensic psychologist. Dr. Proctor testified that he has worked as an expert witness for both the State and the defense. Proctor also stated that he personally evaluated [Cade] for over five hours and conducted a comprehensive record review. That review included records of the instant offense, including police reports, [Cade's] 9–1–1 call, and [Cade's] subsequent statements to police; the psychological evaluation conducted by mental-health staff at the jail immediately following [Cade's] arrest; records of [Cade's] mental-health treatment while awaiting trial; police, community supervision, and prison records associated with [Cade's] prior arrests and convictions; [Cade's] school, employment, and medical records; and the mental-health records of [Cade's] father. Proctor testified that clinical notes reflected the staff's observations that [Cade] misrepresented, exaggerated, or completely lied about his mental condition in order to be moved to a preferred-housing area. The notes further memorialized [Cade's] admission that he cut his own wrist to make it look as if he were suicidal, so that jail officials would transfer him from the administrative-segregation housing unit.

Proctor told the jury that, before the offense, [Cade] showed some depressive symptoms due to a back injury, but the symptoms did not rise to the level of a severe mental disease or defect or "anywhere close." Following the killings and [Cade's] incarceration on capital-murder charges, psychological staff at the jail diagnosed [Cade] with adjustment disorder with depressed mood and treated him with the lowest suggested therapeutic dose of a common antidepressant. Proctor described [Cade's] depression as mild and stated that the adjustment disorder reflected [Cade's] reaction to his current legal difficulties. Proctor also testified that neither of [Cade's] current diagnoses reached the level of a severe mental disease, and he opined that [Cade] had no severe mental disease or defect at the time of the offense. Therefore,

> Proctor concluded, [Cade] knew when he killed Fuller and Desaree that what he was doing was wrong.

Id. at *3–4 (footnotes omitted).

II. Evidence Relating to Punishment

A. The State's evidence

The State opened its punishment case by presenting the facts underlying Cade's prior sexual-assault conviction. (49 R.R.[1] at 30). Charity Trice testified that she met Cade at a laundromat in November 1999, and they exchanged phone numbers. (*Id.* at 38). After talking to him on the phone a few times, Trice invited Cade to join her out for drinks one night with some coworkers. (*Id.* at 38–40). Afterward, Cade drove her home, and Trice invited him inside her apartment. (*Id.* at 41–42). But when Trice attempted to end the evening, Cade grabbed her arm, threw her to the ground, and threatened to beat her if she did not have sex with him. (*Id.* at 44–46). Cade told Trice, "Don't make me kill you like the last girl." (*Id.* at 46). At one point, Trice managed to stab Cade with a pocketknife, but it "didn't even phase him." (*Id.* at 47–48). Trice testified that she had "no doubt" in her mind that Cade would kill her if she didn't give him what he wanted. (*Id.* at 48–49). So Trice did what she believed she had to do in order to save her life: she gave in to Cade's demands. (*Id.* at 46–48, 51–52).

Cade and Trice went into the bedroom, where Cade held Trice by her wrist and raped her. (*Id.* at 50–52). Cade also forced Trice to stand over his face while he

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[1] "R.R." refers to the reporter's record from Cade's trial and is preceded by the volume number and followed by the relevant page or exhibit number.

"put his mouth in places." (*Id.* at 51). When Trice was finally able to escape Cade's grasp, she wrapped herself in a blanket and ran out of her apartment, screaming for help. (*Id.* at 63). A neighbor let her inside and called the police. (*Id.* at 63–64). The next day, Cade called Trice and left her an apologetic voicemail. (*Id.* at 67–68).

Cade was ultimately convicted of sexually assaulting Trice and sentenced to three years' probation. (*Id.* at 68–69). His court-ordered sex-offender-treatment provider, Al Merchant, testified that Cade refused to accept responsibility for the crime and insisted his encounter with Trice had been consensual. (50 R.R. at 26–30). Merchant described Cade as manipulative and uncooperative; he eventually terminated Cade from the treatment program and informed Cade's probation officer that he posed a high risk of reoffending.[2] (*Id.* at 32–34, 36–38).

The State also presented evidence of Cade's violent behavior toward another woman—his former girlfriend, Bobbi Jo Klute. (49 R.R. at 89–90, 93). Klute testified that Cade once threw a beer bottle at her car windshield after a fight, and that by the end of their relationship, she was afraid of him. (*Id.* at 91–93). After Klute ended the relationship, Cade harassed her for months, calling her from a pay phone near her home and following her. (*Id.* at 91–92). Cade would threaten Klute that if he could not have her, no one could. (*Id.* at 95). During this time, Klute also suspected Cade of entering her home when she was not there and going through her photos and other belongings. (*Id.* at 92–93). On one occasion when Klute was at her

[2] Several months after his termination from Merchant's program, the trial court revoked Cade's probation and sentenced him to three years' imprisonment for the assault on Trice. (50 R.R. at 36; 55 R.R. at State's Ex. 237).

father's house with a male friend, Cade arrived uninvited, kicked in the door, and assaulted Klute's friend. (*Id.* at 94–95). Klute testified that Cade was always apologetic after they fought and would try to manipulate her into taking him back. (*Id.* at 95–96).

Other evidence presented by the State at punishment included the testimony of Cade's cousin Ashton Scott, who described how Cade had once shot a man in the back and allowed Ashton[3] to take the blame for it, and how Cade had assaulted their uncle by hitting him in the face with a bottle. (*Id.* at 124–25, 127–31, 133). A Texas Department of Criminal Justice (TDCJ) employee, Travis Turner, testified about the greater freedoms Cade would have in prison if he were sentenced to life without parole rather than the death penalty, the types of weapons inmates can fashion, and the crimes they can commit while incarcerated. (*Id.* at 232, 241, 243–48, 251, 255–56, 263–66). According to Turner, there is no way for TDCJ to completely control an inmate. (*Id.* at 269).

B. Cade's evidence

In his punishment case, Cade supplemented the frontloaded mitigating facts he was able to elicit in connection with his insanity defense with additional evidence regarding his father's mental illness, his unstable and traumatic childhood, and the devastating neck injury that abruptly ended his chances of

[3] Since several witnesses at trial share the surname "Scott," Respondent will refer to those witnesses by their first names.

playing college football. (50 R.R. at 31–33, 41–42, 58–59; 51 R.R. at 18–20; 56 R.R. at Def.'s Ex. 2A).

Cade's father, Jerry Cade Ford, testified via video deposition. (56 R.R. at Def.'s Ex. 2A). Ford said that he had been hospitalized in mental institutions, and that he hears voices that tell him to kill people or commit suicide. (*Id.* at 6, 8). He claimed that he left Cade's mother because she was abusive. (*Id.* at 11). He also claimed that Cade's mother performed oral sex on Cade when he was two years old. (*Id.* at 12). According to Ford, when he saw this, he tried to hit Cade's mother with a hammer while Cade watched. (*Id.* at 13). Cade's mother then took Cade to her mother's house. (*Id.*). Ford did not see Cade again until he was eight to eleven years old and never saw him again after that. (*Id.* at 15–16). Ford believed that his children had mental illnesses like him, but that they had never been diagnosed. (*Id.* at 17).

Cade called James Kemp, his former coworker and friend from his job at a machine shop. (50 R.R. at 57–58). Kemp testified that Cade was a good worker. (*Id.* at 58). He also said that he had met Fuller and Hoskins at a birthday party for Cade's daughter and that everyone seemed to get along at the party. (*Id.* at 58–59). Kemp recalled that Cade had hurt his back on the job. (*Id.* at 60). On cross-examination, Kemp acknowledged that he did not know the details of the offenses or that Cade had sexually assaulted Fuller after stabbing her. (*Id.* at 67).

Cade also offered the testimony of his cousin Rhea Scott, who grew up with him. (51 R.R. at 31–32). Rhea testified that Cade did not have a good childhood. (*Id.*

at 33). She stated that eight or nine children were raised together in her family, and that they were all passed among various caretakers. (*Id.* 32–33). She recalled that although Cade's mother helped raise him, she was in and out of his life. (*Id.* at 41–42). Rhea testified that Cade and his daughter stayed with her for a time, and that Cade was his daughter's primary caretaker and a loving, attentive father. (*Id.* at 33–36, 38). Rhea also testified that Cade had always been good to her two children. (*Id.* at 34). As for Cade's relationship with Hoskins, Rhea recalled that although she knew "there were problems," she did not believe their problems were unusual for a stepparent and stepdaughter. (*Id.* at 35). Rhea testified that Cade's daughter, who was twelve years old at the time of trial, was having a difficult time with the situation and still loved her father "very much." (*Id.* at 37–38).

Cade presented evidence of his high-school football career through his former teammate and friend, Jason Shanks, now a practicing attorney. (*Id.* at 12–13, 15–16). Shanks first met Cade when they played pee-wee football together in elementary school. (*Id.* at 13–14). They later played on the Irving High School football team together for two years. (*Id.* at 15–16). Since Shanks was a year ahead of Cade in school, their coaches would sometimes ask him to help Cade with his schoolwork. (*Id.* at 15, 22). Shanks recalled that Cade was "phenomenal" as a football player, that there were articles written about him, and that he attracted attention from recruiters. (*Id.* at 16–18, 25). But all that ended when Cade suffered what Shanks described as a "really bad injury" on the football field:

> [T]he play was a sweep or something to the left, and Tyrone ended up getting hit on the outside and didn't get up and didn't get up for quite

> some time. It was, you know, it was scarey [*sic*] and he wasn't moving much. Ultimately he did get up and I think he came off the field under his own power from what I remember, and the trainers diagnosed him as having a stinger, a neck stinger.

(*Id.* at 17–18). Shanks testified that after this incident, Cade continued to have dizzy spells and some partial paralysis on one side of his body. (*Id* at 18). Eventually, Shanks's parents took Cade to a doctor, who diagnosed him with a genetic condition that had caused a narrowing of his spinal column at the base of his neck and that raised his risk of sustaining a spinal-cord injury. (*Id.* at 19). The doctor told Cade he could not play football anymore. (*Id.* at 19).

Shanks testified that this news was "devastating" to Cade, who, Shanks believed, "had a real shot to go to a big school and play football for a big school, get out of Irving." (*Id.* at 19). Shanks recalled that before his injury, Cade "was a good kid," beloved by teachers, parents, and his fellow students. (*Id.*). After high school, Shanks kept in touch with Cade for several years, until the two friends drifted apart once Shanks began law school. (*Id.* at 20–21).

Like the State, Cade also presented evidence at punishment about what his life in prison would look like, except Cade's evidence focused on TDCJ's ability to manage inmates. An exonerated former inmate, Johnny Lindsey, described day-to-day life inside a TDCJ prison and the extent to which prison officials control and monitor inmates' behavior. (50 R.R. at 79–80, 88–98). S.O. Woods, a former TDCJ employee turned prison consultant, testified to the robust array of security measures in place in TDCJ prisons and to the restrictions automatically imposed on life-without-parole inmates. (*Id.* at 126–34, 140, 145–47). Woods also testified that

Cade had not had any disciplinary procedures initiated against him during his previous stint in prison. (*Id.* at 149–50). A detention officer who dealt with Cade during his first prison stay testified that Cade always followed instructions and never caused any trouble. (*Id.* at 119, 121).

C. The State's rebuttal evidence

On rebuttal, the State called Michael Hoskins, Desaree's older brother. (51 R.R. at 48). He testified that neither he nor Desaree had liked Cade. (*Id.* at 49–50). He explained that they both had disapproved of Fuller dating Cade, that he had moved out of Fuller's house because of Cade, and that he had feared for his mother's safety and tried to warn her about Cade. (*Id.* at 50).

III. Cade's IATC Claims in State and Federal Court

A. Cade's claims on initial state habeas

In compliance with Texas law, the trial court appointed OCFW to represent Cade in his state writ proceedings on September 12, 2012, fourteen days after sentencing Cade to death. (C.R.[4] at 421–22, 448). *See* Tex. Code Crim. Proc. Ann. art. 11.071, § 2(c). Almost two years later, on September 9, 2014, OCFW filed Cade's initial state habeas application, raising sixteen constitutional claims for relief. (3 C.R.H.[5] at 1–147). Eleven of those claims were IATC claims.[6] (*Id.* at 31–76, 82–121

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[4] "C.R." refers to the single-volume clerk's record from Cade's trial and is followed by the relevant page number.

[5] "C.R.H." refers to the clerk's record of filings made in the trial court during the initial state habeas proceedings. The clerk's record consists of several volumes, each labeled "Supplemental," and each filed in the TCCA on a different date. For simplicity's sake, Respondent will refer to the record filed on April 20, 2017, as "1 C.R.H."; to the record filed on October 3, 2017, as "2 C.R.H."; and to the record filed on November 16, 2017, as "3 C.R.H.," all followed by the relevant page number.

(claims 1–3, 5–12)). Specifically, OCFW alleged that Cade's trial counsel were ineffective for:

- presenting an insanity defense that was neither properly investigated nor coherently presented;
- failing to investigate and present mitigating evidence concerning Cade's relationship with his daughter, his upbringing and childhood, his middle- and high-school years, and the stressors in his life leading up to the murders;
- failing to present, as part of their mitigation case, a social historian to educate the jury about how Cade's upbringing and background contributed to his poor decision-making and lack of self-control;
- failing to present mitigating evidence regarding Cade's mental illness, low IQ, and remorsefulness;
- failing to adequately voir dire one of the prospective jurors regarding the insanity defense;
- failing to request the removal of a juror whose daughter's coworker was a friend of Fuller's sister;
- eliciting testimony during the guilt phase that Cade was a convicted felon;
- failing to preserve their pretrial objection to the admission of evidence during the guilt phase that Cade was a registered sex offender;
- failing to timely object to victim-impact evidence at the guilt phase;
- failing to object to improper guilt-phase closing arguments by the State; and

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[6] After the TCCA denied his direct appeal, and while his initial application was still pending in the trial court, OCFW filed a second habeas application (Cade's first subsequent writ) raising an additional IATC claim based on trial counsel's failure to preserve an issue that the TCCA held was forfeited on direct appeal. *See* Subsequent Application for a Writ of Habeas Corpus, *Ex parte Cade*, No. W11-33962-R(B) (265th Dist. Ct., Dallas County, Tex. Apr. 28, 2015). The TCCA dismissed this first subsequent application as an abuse of the writ under Texas Code of Criminal Procedure article 11.071, section 5(a), without considering its merits. *See Ex parte Cade*, No. WR-83,274-01, 2017 WL 4803782, at *1 (Tex. Crim. App. Oct. 25, 2017) (per curiam).

- failing to preserve a complete trial record.

(*Id.*) OCFW devoted approximately 84 of the application's 146 pages to arguing these IATC claims and submitted 21 exhibits in support, including 17 expert and lay-witness affidavits. (*Id.* at 31–76, 82–121, 151–96, 256–313, 318–26).

In support of Cade's insanity-defense IATC claim, OCFW presented affidavits from all three defense experts who had evaluated Cade for insanity before trial—Dr. Lisa Clayton, a psychiatrist; Dr. Emily Fallis, a psychologist; and Dr. William Flynn, a psychologist. (*Id.* at 189–90 (Ex. 2), 192–93 (Ex. 3), 195–96 (Ex. 4)). OCFW also presented an affidavit from defense attorney Philip Wischkaemper, who discussed the standards for capital-defense representation and how, in his opinion, trial counsel's decision to pursue an insanity defense fell below those standards and prejudiced Cade at both the guilt and punishment phases of trial. (*Id.* at 256–70 (Ex. 7)). Wischkaemper specifically faulted counsel for not presenting evidence to rebut the culpable mental state for capital murder. (*Id.* at 261–62).

Regarding Cade's mitigation-case IATC claim, OCFW presented an affidavit from criminal-justice professor and social historian Scott Bowman, Ph.D., detailing the mitigating features of Cade's background and life history. (*Id.* at 155–87 (Ex. 1)). OCFW also submitted affidavits from Cade's high-school football coaches, a former teacher, his chiropractor, his daughter, an aunt, four cousins, and a half-brother, all attesting to mitigating details about Cade's life history and to the stressors in his life leading up to the murders. (*Id.* at 272–313 (Exs. 8–18)). All of

this evidence, OCFW argued, should have been part of trial counsel's mitigation case.

In addition to submitting written arguments and evidence on Cade's behalf, OCFW sought and obtained an evidentiary hearing before the trial court on all eleven IATC claims. (1 C.R.H. at 1; 3 C.R.H. at 147). That hearing took place over five days in June and November 2016, and concluded with arguments on February 24, 2017. (1–7 R.R.H.[7]). The resulting transcript filled eight volumes, which included approximately 900 pages of testimony and almost 3,500 pages of exhibits. (1–8 R.R.H.). OCFW called eight witnesses to testify during the portion of the hearing held in June: (1) Dr. Kristi Compton, a forensic psychologist and Cade's mitigation specialist at trial (2 R.R.H. at 19–170); (2) Lalon Peale, Cade's lead trial counsel (*Id.* at 170–269; 3 R.R.H. at 11–48); (3) John Tatum, Cade's second-chair trial counsel and his counsel on direct appeal (3 R.R.H. at 49–94); (4) Richard Franklin, Cade's third-chair trial counsel (*Id.* at 95–132); (5) Wischkaemper, OCFW's capital-defense expert (*Id.* at 133–232); (6) Dr. Seth Silverman, a forensic psychiatrist hired by OCFW (4 R.R.H. at 6–90); (7) Jerry Scott, Cade's half-brother (5 R.R.H. at 12–90); and (8) Laura Sovine, a licensed master social worker hired by OCFW (*Id.* at 93–217). During the hearing, OCFW also proffered an affidavit from another of Cade's aunts attesting to his tumultuous childhood and family history of mental illness. (*Id.* at 165–66; 8 R.R.H. at Def.'s Ex. 48).

[7] "R.R.H." refers to the reporter's record from the state habeas hearing and is preceded by the volume number and followed by the relevant page or exhibit number.

OCFW attorneys extensively questioned all three trial counsel and Dr. Compton at the hearing concerning their decision-making in Cade's case—particularly with respect to their choice of a defense theory and their investigation of mitigating evidence. (2 R.R.H. at 19–269; 3 R.R.H. at 11–132). Consistent with his affidavit, Wischkaemper testified that the trial team's preparation and performance at both the guilt and punishment phases did not comport with the appropriate standard of care. (3 R.R.H. at 133–232). OCFW's mental-health expert, Dr. Silverman, testified that his evaluation of Cade showed him to have frontal-lobe disinhibition, traits of schizophrenia, traits of post-traumatic stress disorder (PTSD), and borderline-to-low-average intellectual functioning. (4 R.R.H. at 6–90). Jerry Scott, who shared the same mother with Cade, described their impoverished living conditions growing up and the instability and domestic abuse they experienced as children. (5 R.R.H. at 12–90). Dovetailing with Jerry's account was the testimony of Sovine, whom OCFW had hired to perform a biopsychosocial assessment of Cade. (*Id.* at 126). Sovine testified to the results of her assessment and to her opinion that Cade's upbringing in an environment marked by violence and deprivation prevented him from mastering the developmental skills necessary to become a functioning adult. (*Id.* at 93–217).

In preparation for the final evidentiary hearing date on November 17, 2016, OCFW sought and obtained funding from the trial court to hire Dr. Joan Mayfield, a

neuropsychologist, to evaluate Cade.[8] (1 C.R.H. at 304–43). In addition to conducting two full days of her own neuropsychological assessment of Cade, Dr. Mayfield reviewed the results of the testing that the State's psychologists, Dr. Randall Price and Dr. Timothy Proctor, performed in August 2016. (1 C.R.H. at 381–82). Dr. Mayfield also appeared at the November 17 hearing, during which she observed Drs. Price's and Proctor's testimony and consulted with OCFW attorneys and Dr. Silverman. (1 C.R.H. at 382). OCFW recalled Dr. Silverman as their final witness to testify about his impressions after reviewing Drs. Price's and Proctor's notes and Cade's jail records. (6 R.R.H. at 7–90). Dr. Silverman reiterated his opinion that Cade exhibits traits of schizophrenia, including hearing voices. (*Id.* at 10).

After the hearing, OCFW submitted approximately 140 pages of proposed findings of fact and conclusions of law, arguing that trial counsel's deficiencies at the guilt and punishment phases entitled to him to a new trial. (1 C.R.H. at 389–530). When the trial court did not adopt those findings, OCFW filed objections in the TCCA. *See* Objections to the Convicting Court's Findings of Fact & Conclusions of Law & Request for Remand, *Ex parte Cade*, No. WR-83,274-02 (Tex. Crim. App. Sept. 26, 2017). Ultimately, the TCCA adopted some of the trial court's findings and

[8] Dr. Mayfield was the second neuropsychologist hired by OCFW and the third such expert hired by the defense in Cade's case. Trial counsel hired Dr. Antoinette McGarrahan to perform a neuropsychological assessment of Cade before trial. (1 C.R.H. at 653 (finding 32); 47 R.R. at 89–90, 92). She concluded that he has borderline-to-low-average intellectual functioning, mildly impaired information-processing abilities, depression, and symptoms of PTSD. (47 R.R. at 92, 95–97). During the state habeas proceedings, OCFW retained Dr. James Underhill to review Dr. McGarrahan's data and scoring. (1 C.R.H. at 310; 4 R.R.H. at 8–9). *See* Appendix to Second Subsequent Application for Writ of Habeas Corpus at 6918–19.

conclusions, rejected others, and made findings of its own after an independent review of the record. *See Ex parte Cade*, No. WR-83,274-02, 2017 WL 4803802, at *1–3 (Tex. Crim. App. Oct. 25, 2017) (not designated for publication). Based on its adopted and independent findings and conclusions, the TCCA denied relief. *See id.* at *3. Cade did not seek certiorari review of the TCCA's decision.

B. Cade's claims on federal habeas

Cade next received the appointment of federal counsel, who filed an original petition for habeas relief on his behalf on October 25, 2018, *see* Petition for Writ of Habeas Corpus, *Cade v. Davis*, No. 3:17-CV-03396-G (N.D. Tex. Oct. 25, 2018), ECF No. 33, and an amended petition on March 28, 2019, *see* Amended Petition for Writ of Habeas Corpus, *Cade v. Davis*, No. 3:17-CV-03396-G (N.D. Tex. Mar. 28, 2019), ECF No. 79. Cade's amended federal petition raised twenty claims for relief, including eight IATC claims. Amended Petition for Writ of Habeas Corpus at i–v. The petition alleged trial counsel were ineffective for:

- stipulating to the pre-voir-dire removal of prospective jurors with strongly held views both for and against the death penalty;
- failing to investigate and present a guilt-phase defense of "confusional arousal" instead of insanity;
- eliciting testimony during the guilt phase that Cade was a convicted felon;
- failing to timely object to the introduction of victim-impact evidence at the guilt phase;
- failing to object to the State's outside-the-record arguments at the guilt phase;

- failing to develop and present evidence that Cade is intellectually disabled;
- failing to present available evidence rebutting future dangerousness; and
- failing to investigate, develop, and present mitigating evidence.

Amended Petition for Writ of Habeas Corpus at 37–42, 50–79, 87–103, 121–86 (claims 2, 4–7, 10–11, 18).

Cade attached new evidence in support of his guilt- and punishment-phase IATC claims, including declarations from several mental-health experts whom federal writ counsel had hired to evaluate Cade. *See* Appendix to Petition for Writ of Habeas Corpus at 6418–6570, ECF No. 46. Dr. Behk Bradley, a psychologist; Dr. Bhushan Agharkar, a psychiatrist; and Dr. Jeff Victoroff, a neuropsychiatrist, all concluded that Cade suffers from symptoms of PTSD, depression, psychosis, and possible brain damage from repetitive concussive injuries sustained while playing tackle football. *Id.* Dr. Victoroff also believed that Cade has a non-rapid-eye-movement (NREM) sleep disorder rarely associated with instances of sleep-related violence. *Id.* at 6479, 6501, 6507. While acknowledging his "extremely limited access to many facts" about this case; his own "admittedly limited knowledge, training, and cerebral capacities"; and his "inability to determine with any degree of certainty whether Mr. Cade's statements—however plausible—are true," Dr. Victoroff nevertheless declared that Cade "probably stabbed [Fuller and Hoskins] in a NREM sleep or a confusional arousal state lacking conscious awareness of his actions." *Id.* at 6507, 6523–24.

In his amended petition, Cade acknowledged that several of his IATC claims were unexhausted but, relying on *Martinez* and *Trevino*, maintained he could overcome the procedural default because his state habeas counsel were ineffective for failing to present those claims in state court. Amended Petition for Writ of Habeas Corpus at 89, 102–03. Cade also asserted that state habeas counsel's alleged ineffectiveness entitled him to a more favorable standard of review of his previously litigated IATC claims because those claims had not been fully developed in state court. *Id.* at 50, 70, 186. In his later reply to the Director's response, Cade attempted to support his *Martinez/Trevino* argument with new declarations from several former OCFW attorneys and investigators, complaining of sub-optimal working conditions at OCFW during the time they were preparing and litigating Cade's first state writ application. *See* Reply in Support For Writ of Habeas Corpus, *Cade v. Davis*, No. 3:17-CV-03396-G (N.D. Tex. Nov. 12, 2019), ECF No. 98; Appendix to Reply in Support For Writ of Habeas Corpus at 6782–814, ECF No. 98-1. Collectively, these declarations described the office as underfunded; staffed by overworked and inexperienced attorneys and investigators; and poorly managed by former director Brad Levenson and, to a lesser extent, by his successor and current director, Benjamin Wolff. Appendix to Reply in Support For Writ of Habeas Corpus at 6782–814.

Approximately nine months after filing his amended federal petition, Cade moved for a stay and abeyance under *Rhines v. Weber*, 544 U.S. 269, 277 (2005), seeking to return to state court with five claims, including his IATC claims

regarding the insanity defense, future dangerousness, and mitigation. *See* Opposed Motion for Stay and Abeyance at 1–2, *Cade v. Davis*, No. 3:17-CV-03396-G (N.D. Tex. Dec. 18, 2019), ECF No. 100. The magistrate judge found that the TCCA had already rejected Cade's insanity and mitigation-case IATC claims on their merits and that *Martinez* and *Trevino* did not furnish Cade an avenue to relitigate those claims with new factual allegations and new evidence. *See Cade v. Davis*, No. 3:17-CV-03396-G, 2020 WL 6576179, at *2 (N.D. Tex. July 2, 2020). But after concluding that Cade was entitled to a stay and abeyance on his intellectual-disability claim, the magistrate judge recommended that Cade be permitted to seek state-court review (or re-review) of "any and all" of his federally pleaded claims, including his previously litigated IATC claims. *Id.* at *6.

The federal district court adopted the magistrate's findings, conclusions, and recommendations; granted Cade's motion for stay and abeyance; and ordered him to file, within sixty days, a subsequent state habeas application containing all the claims he wanted the federal court to consider in ruling on his petition for habeas relief, as well as all factual allegations and evidence supporting those claims. *See Cade v. Lumpkin*, No. 3:17-CV-03396-G, 2020 WL 4877586, at *1–2 (N.D. Tex. Aug 19, 2020).

C. Cade's claims on subsequent state habeas

In accordance with the federal court's order, Cade filed his second subsequent state writ application on October 19, 2020, presenting all twenty claims raised in

his amended federal petition, including the eight IATC claims.[9] Second Subsequent Application for Writ of Habeas Corpus at i–ix, *Ex parte Cade*, No. W11-33962-R(C) (265th Dist. Ct., Dallas County, Tex. Oct. 19, 2020). Cade supported his claims with all the same evidence he brought before the federal court, as well as a new OCFW declaration from current director Wolff, critiquing his office's handling of Cade's first state writ application. *See* Appendix to Second Subsequent Application for Writ of Habeas Corpus at 6914–25.

In an unpublished, per curiam order, the TCCA found that Cade's claims did not satisfy the requirements of article 11.071, section 5, of the Texas Code of Criminal Procedure and dismissed his second subsequent application as an abuse of the writ "without considering the merits of the claims." *Ex parte Cade*, No. WR-83,274-03, 2021 WL 1202479, at *2 (Tex. Crim. App. Mar. 31, 2021) (per curiam) (not designated for publication); *see* Tex. Code Crim. Proc. Ann. art. 11.071, § 5(c). The present petition followed.

REASONS FOR DENYING THE PETITION

The question Cade presents for review is unworthy of the Court's attention. As an initial matter, the TCCA's disposition of Cade's subsequent writ application rests on an independent and adequate state-law ground—Texas's procedural bar on subsequent writs—and is therefore unassailable on certiorari. Moreover, Cade's

[9] Cade's application purported to present twenty-two claims. Two claims, however, were duplicated: that trial counsel were ineffective by failing to adequately defend against a finding of future dangerousness (claims 11 and 13), and that the trial court erroneously excluded expert testimony on future dangerousness (claims 12 and 14). *See* Second Subsequent Application for Writ of Habeas Corpus at i–ix.

attempt to place himself in the position of a capital habeas applicant who, due to the ineffectiveness of state habeas counsel, has never received merits review of a substantial IATC claim is wholly unavailing. On initial habeas review, the TCCA adjudicated the merits of eleven claims alleging Cade's trial counsel were ineffective at the guilt and penalty phases of his trial, including claims challenging counsel's effectiveness with respect to the choice of a defense and the investigation and presentation of mitigating evidence. Nothing in the Constitution or this Court's precedents requires a state habeas court, having once passed on trial counsel's effectiveness in these areas, to entertain reformulated and rehashed IATC claims in a subsequent writ proceeding.

Moreover, this case is a poor vehicle to address the question presented because even judged by Sixth Amendment effectiveness standards, Cade's habeas counsel provided objectively reasonable, professional assistance during his initial state writ proceeding. The state habeas record speaks for itself: OCFW extensively investigated, diligently prepared, and thoroughly litigated Cade's application for habeas relief. They challenged trial counsel's performance by way of eleven separate claims for relief, alleging deficiencies at both the guilt and penalty phases of trial. They specifically challenged trial counsel's decision to pursue an insanity defense and the depth of the trial team's mitigation investigation. That federal habeas counsel would have handled these claims differently—or even that former OCFW counsel, viewing their representation in hindsight, can find fault with it—does not establish constitutional ineffectiveness.

Finally, the TCCA's enforcement of a procedural bar in this case does not implicate any due process concerns. This Court has consistently held that a convicted person has no constitutional right to counsel in state postconviction writ proceedings. Absent a constitutional right to counsel, there is no concomitant right to the constitutionally effective assistance of counsel in such proceedings. That Texas provides a statutory right, in capital cases, to the appointment of "competent counsel" for an applicant's first state habeas proceeding does not obligate its courts, as a matter of due process, to recognize a right to constitutionally effective performance by the appointed counsel. Competency does not equal Sixth Amendment effectiveness, and a state's decision to provide only for the appointment of competent counsel in a postconviction proceeding where no constitutional right to counsel exists is a reasonable exercise of the state's substantial discretion in this area. Thus, no compelling reason exists to grant certiorari in this case, and the Court should deny Cade's petition.

I. This Court Lacks Jurisdiction to Grant Review Because the TCCA's Decision Rests Exclusively on State-Law Procedural Grounds.

Cade's petition seeks review of the TCCA's order dismissing his second subsequent state habeas application as an abuse of the writ under Texas Code of Criminal Procedure article 11.071, section 5. Since the TCCA's decision involves nothing more than a proper application of Texas's procedural rules governing subsequent habeas applications in death-penalty cases, Cade's petition presents nothing for this Court to consider.

Article 11.071, section 5, of the Texas Code of Criminal Procedure prohibits a state court from considering the merits of or granting relief on a death-sentenced inmate's subsequent state habeas application unless the TCCA first determines that the application contains sufficient specific facts establishing that (1) the factual or legal basis for the claim was unavailable at the time the previous application was filed; (2) but for a violation of the Constitution, no rational juror could have found the applicant guilty; or (3) but for a violation of the Constitution, no rational juror would have voted in favor of a death sentence. Tex. Code Crim. Proc. Ann. art. 11.071, § 5(a). If the TCCA determines that none of these three requirements has been satisfied, the court must issue an order dismissing the application as an abuse of the writ. *Id.* art. 11.071, § 5(c).

Here, after setting out a brief procedural history of the case and reciting the claims presented, the TCCA's order states that the court has "reviewed the subsequent application and find[s] that Applicant has failed to satisfy the requirements of Article 11.071, § 5(a). Accordingly, we dismiss the subsequent application as an abuse of the writ *without considering the merits of the claims*." *Ex parte Cade*, 2021 WL 1202479, at *2 (emphasis added). The TCCA's dismissal order reflects its regular and strict application of the section 5 bar, which constitutes an independent and adequate state-law ground for the court's disposition of Cade's claims. *See Hughes v. Quarterman*, 530 F.3d 336, 342 (5th Cir. 2008) ("This court has held that, since 1994, the Texas abuse of the writ doctrine has been consistently

applied as a procedural bar, and that it is an independent and adequate state ground for the purpose of imposing a procedural bar.").

This Court has consistently held that it "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991); *see Lambrix v. Singletary*, 520 U.S. 518, 522–23 (1997). This rule applies whether the state-law ground is substantive or procedural, and in the context of direct review of a state-court judgment, the rule is jurisdictional. *Coleman*, 501 U.S. at 729. "Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory." *Id.*

The TCCA dismissed Cade's subsequent writ application after determining that none of his claims met the requirements of article 11.071, section 5. *Ex parte Cade*, 2021 WL 1202479, at *2. Thus, the court's disposition of Cade's claims rested on a state procedural ground that was both independent of the federal issues raised and adequate to support the judgment. *See Hughes*, 530 F.3d at 342. And by explicitly stating that it had not considered the merits of the claims, the TCCA left no doubt as to the independent, state-law character of its dismissal.

Cade presents no compelling justification for the Court to depart from its long-standing rule against reviewing state-court dismissals that rest on purely state-law grounds. The TCCA's dismissal of Cade's IATC claims was not a decision

on the merits of those claims but rather, a decision that the claims did not meet the requirements of section 5. Because the TCCA did not decide any federal question in its disposition of Cade's claims, this Court should deny his petition for certiorari review. *See* Sup. Ct. R. 10(b)–(c).

II. This Case Is an Exceedingly Poor Vehicle to Decide the Question Presented Because Cade's State Habeas Counsel Effectively Litigated His IATC Claims on Initial Collateral Review.

Relying on principles grounded in *Martinez* and *Trevino*, Cade argues that due process entitles him to receive merits review from the TCCA of his Sixth Amendment IATC claims that were forfeited due to original state habeas counsel's alleged incompetence. But the IATC claims he points to—those regarding trial counsel's choice of a defense and their investigation and presentation of mitigating evidence—were not forfeited at all; as the federal district court noted, the TCCA adjudicated those claims on their merits on initial state habeas review. *See Cade*, 2020 WL 6576179, at *2. Thus, unlike the petitioners in *Martinez* and *Trevino*, whose subsequent IATC claims were procedurally barred in state court because they were not raised in the initial collateral-review proceedings, Cade's claims were barred because they had already been rejected on their merits. *See Trevino*, 569 U.S. at 418; *Martinez*, 566 U.S. at 6–7; *Ex parte Cade*, 2017 WL 4803802, at *3. Thus, the concern that prompted this Court to recognize a federal equitable exception to the application of normal procedural-default rules to substantial IATC claims that would otherwise escape review altogether is not present in this case. *See Davila v. Davis,* 137 S. Ct. 2058, 2067 (2017).

Because his initial habeas counsel did, in fact, litigate Cade's choice-of-defense and mitigation-case IATC claims on initial habeas review, Cade is left to argue that they were ineffective because they should have litigated those claims differently. (Pet. at 11, 38). What he seeks, therefore, is another opportunity to present these claims to the TCCA, this time with evidence and arguments developed and formulated during federal habeas proceedings prior to the remand to state court. But this Court has never indicated that it intended the "narrow exception" announced in *Martinez* to extend to IATC claims that received substantive merits adjudication during initial collateral review. Although Cade now contends that trial counsel were ineffective for not presenting a confusional-arousal theory as a defense at the guilt phase or as mitigating evidence at the penalty phase, the gravamen of his legal argument is the same as the one the TCCA rejected on initial habeas review: that trial counsel were ineffective with respect to both guilt and mitigation. *See, e.g.*, *Strickland v. Washington*, 466 U.S. 668, 675 (1984) (treating the petitioner's six complaints about his counsel's "ineffective assistance at the sentencing proceeding" as a single ground for relief).

There would be no end to litigation if state courts were required to entertain on subsequent habeas review every reformulation of previously adjudicated IATC claims. *See generally Ward v. Stephens*, 777 F.3d 250, 257 n.3 (5th Cir. 2015) (observing that since *Martinez*, a habeas petitioner now has an incentive to "strategically concede[] his IAC claim was unexhausted"), *abrogated on other grounds by Ayestas v. Davis*, 138 S. Ct. 1080, 1092–93 (2018). Because Cade would

not qualify for a *Martinez*-like exception, there is no compelling reason for this Court to decide whether that exception should have been applied in this case.

Additionally, even if the TCCA recognized a *Martinez*-like exception to Texas's statutory bar on subsequent writs, the result in this case would have been the same because Cade has failed to show that his first state habeas counsel performed ineffectively under the standards of *Strickland*. *See Martinez*, 566 U.S. at 14. The record from the state habeas proceedings plainly refutes such an argument. Cade's state-appointed habeas counsel, OCFW, made significant efforts to challenge his conviction and sentence, presenting IATC claims addressing all stages of the trial. OCFW assigned three attorneys and three mitigation investigators to Cade's case. *See* Appendix to Reply in Support For Writ of Habeas Corpus at 6782–83, 6786–87, 6792–93, 6796, 6803, 6807, 6810–11. They hired a capital-defense expert to thoroughly critique trial counsel's performance with respect to both guilt and punishment. (3 C.R.H. at 256–70 (Ex. 7); 3 R.R.H. at 133–232). They also engaged several experts to assist in their investigation of Cade's mental health, intellectual functioning, background, and other mitigating evidence that they claimed trial counsel failed develop.

Specifically, OCFW hired Dr. Underhill, a neuropsychologist, to review the defense experts' pretrial neuropsychological testing. (1 C.R.H. at 310; 4 R.R.H. at 8–9). They hired a second neuropsychologist, Dr. Mayfield, who conducted two full days of neuropsychological testing on Cade, reviewed records, and consulted with Cade's attorneys at the writ hearing. (1 C.R.H. at 304–43, 381–82). And they hired

Dr. Silverman, a psychiatrist, who evaluated Cade on two separate occasions; reviewed extensive background materials; and testified at the evidentiary hearing that Cade has frontal-lobe impairment, PTSD, and traits of schizophrenia. (4 R.R.H. at 62, 72; 6 R.R.H. at 10–23). Moreover, in addition to proffering affidavits and testimony from Cade's family and friends describing his difficult childhood and the stressors in his life at the time of the murders, OCFW presented a social history of Cade's life prepared by criminal-justice professor Scott Bowman and extensive testimony from social worker Laura Sovine concerning her biopsychosocial assessment of Cade. (3 C.R.H. at 155–87 (Ex. 1); 5 R.R.H. at 93–217).

In their declarations attached to Cade's second subsequent writ application, Cade's OCFW attorneys and investigators assert that they could have done more had they had more experience, time, and resources. *See* Appendix to Second Subsequent Application for Writ of Habeas Corpus at 6782–814, 6914–25). But this is the height of the Monday-morning quarterbacking that *Strickland* precludes. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. A good advocate will always seek to improve their performance from case to case and will always lament that perhaps they could have done more. *Cf. Harrington v. Richter*, 562 U.S. 86, 109 (2011) ("After an adverse verdict . . . even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and,

in the course of that reflection, to magnify their own responsibility for an unfavorable outcome."). "*Strickland*, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind." *Harrington*, 562 U.S. at 110. Viewed as a whole, OCFW's performance in this case was well "within the range of reasonable professional assistance." *Bell v. Cone*, 535 U.S. 685, 702 (2002).

Cade argues that OCFW attorneys were deficient for not raising an IATC claim based on trial counsel's failure to investigate a theory that Cade was asleep at the time of the murders—a theory, he contends, that would have given him "a complete defense to capital murder, to eligibility for the death penalty, and a powerful mitigating circumstance." (Pet. at 5). He points to the attorneys' declarations, in which they admit they were unaware of a 1925 TCCA case identifying somnambulism as a "species of insanity" and holding that the trial court should have instructed the jury to acquit the defendant upon a finding that he committed the murder while asleep. (*Id.* at 15, 33). *Bradley v. State*, 277 S.W. 147, 148–49 (Tex. Crim. App. 1925). But even if they had never heard of this specific case, habeas counsel certainly knew that a conviction for capital murder requires proof of a voluntary act and an intentional or knowing mens rea. *See* Tex. Penal Code Ann. §§ 6.01(a), 6.03(a)–(b), 19.02(b)(1), 19.03(a)(7). Thus, habeas counsel likely knew that they could provide a complete defense to capital murder *if* they could show that because he was asleep, Cade did not act voluntarily or with the

requisite culpable mental state to commit capital murder. *See Mendenhall v. State*, 77 S.W.3d 815, 818 (Tex. Crim. App. 2002).

Common sense, not ignorance of the law, likely deterred OCFW from presenting a theory so at odds with the evidence, which overwhelming showed that Cade was fully conscious at the time of the murders. Initial habeas counsel knew that Cade had given detailed confessions, none of which included any mention of his falling asleep before stabbing Fuller and Hoskins, and all of which revealed his clear motives for the slayings—anger, jealousy, and a desire for revenge. Initial habeas counsel also knew that after stabbing the victims a total of sixty-seven times, Cade then raped Fuller multiple times, left the house to purchase lubricant before returning to rape her again, listened to pornographic recordings, drove around in Fuller's car, and visited his aunt's house—all before calling 911. (54 R.R. at State's Ex. 207A, pp. 3–32; 2 R.R.H. at 142–43).

Even Cade's new expert, Dr. Victoroff, points to absolutely no fact-based evidence to substantiate his assertion—upon which he bases his entire confusional-arousal theory—that after "obsessively" listening to Fuller's Skype interaction with her ex-husband and concocting "a plan of revenge" to scare Fuller with a knife, Cade "apparently fell asleep" while holding the knife.[10] Appendix to Second Subsequent Application for Writ of Habeas Corpus at 6493. Additionally, initial habeas counsel knew that trial counsel had hired numerous experts, none of whom concluded that

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[10] Dr. Victoroff never opines at what point, in the midst of the stabbings, sexual assaults, and trips outside the house, Cade regained consciousness.

Cade suffered from brain impairment or severe mental illness, or that he was asleep when he committed the murders. OCFW was not required to "scour the globe" for an expert who would manufacture a defensive theory based solely on the defendant's self-serving, post-trial assertions and without considering all the countervailing evidence. *See Rompilla v. Beard*, 545 U.S. 374, 383 (2005).

On initial state habeas review, OCFW challenged trial counsel's effectiveness in pursuing an insanity defense that was not supported by sufficient expert testimony and for failing to develop and present sufficient mitigating evidence regarding Cade's difficult childhood, life stressors, and mental-health issues. It was eminently reasonable for OCFW to choose not to dilute those claims with an argument that trial counsel should have pursued a specific, alternative "unconsciousness" defense that conflicted with Cade's own statements and the record. *See Harrington*, 562 U.S. at 107 ("Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective . . . tactics and strategies."). Cade has failed to overcome the presumption that his state habeas counsel exercised reasonable professional judgment in deciding to focus as they did.

Because Cade's original state habeas counsel performed effectively in litigating his guilt and punishment-phase IATC claims on initial collateral review, the concern underlying *Martinez* and *Trevino*—"that no state court at any level will hear" the prisoner's IATC claims—is not present here. Thus, this case is not the appropriate avenue to address whether a *Martinez*-like exception should apply to

Texas's statutory subsequent-writ bar. This Court should deny Cade's petition for writ of certiorari.

III. Cade's Contention that Due Process Requires the TCCA to Consider Procedurally Barred IATC Claims on Subsequent Habeas Review Is Meritless.

Cade argues that because Texas's capital habeas statute provides that applicants "shall be represented by competent counsel" in their first state writ proceedings, Tex. Code Crim. Proc. Ann. art. 11.071, § 2(a), Texas courts have a due process obligation to recognize an exception to the subsequent-writ bar for IATC claims not raised on initial habeas due to habeas counsel's ineffectiveness. (Pet. at 23). Cade's argument conflates the "competent counsel" requirement of article 11.071 with the constitutional-effectiveness standard underpinning *Martinez*. This Court has never held that anything less than *Strickland*-level deficiencies on the part of habeas counsel would constitute cause to overcome a procedural bar.

There are only two paths by which this Court could reach the result Cade seeks: by interpreting a Texas statute contrary to the TCCA's interpretation (i.e., by determining that when the Texas legislature said death-sentenced prisoners must be appointed "competent counsel" in initial state habeas proceedings, it really meant "constitutionally effective counsel"), or by determining that all initial postconviction state habeas counsel must be constitutionally effective by Sixth Amendment standards. Neither path is warranted or appropriate.

"It has long been the rule that attorney error is an objective external factor providing cause for excusing a procedural default only if that error amounted to a deprivation of the constitutional right to counsel." *Davila*, 137 S. Ct. at 2065 (citing

Edwards v. Carpenter, 529 U.S. 446, 451 (2000)). An error amounting to constitutionally ineffective assistance is "imputed to the State," while attorney error that does not violate the Constitution is attributed to the defendant "under well-settled principles of agency law." *Id.* (first quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986); and then quoting *Coleman*, 501 U.S. at 754). "It follows, then, that in proceedings for which the Constitution does not guarantee the assistance of counsel at all, attorney error cannot provide cause to excuse a procedural default." *Id.* This is the case in state postconviction proceedings, for which no constitutional right to counsel exists. *Coleman*, 501 U.S. at 755.

In *Martinez*, this Court announced a narrow, equitable qualification to *Coleman* that applies where state law requires prisoners to raise IATC claims "in an initial-review collateral proceeding," rather than on direct appeal. *Martinez*, 566 U.S. at 9, 16–17. In those situations, a procedural default will not bar a federal habeas court from hearing a substantial IATC claim "if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Id.* at 17. In *Trevino*, this Court clarified that the *Martinez* exception applies whether state law explicitly or effectively forecloses review of IATC claims on direct appeal. *Trevino*, 569 U.S. at 428–29.

Martinez and *Trevino* did not alter the long-standing rule that states have no federal constitutional obligation to provide *any* habeas counsel—much less constitutionally effective habeas counsel—to convicted individuals. *See Davila*, 137 S. Ct. at 2065 (citing *Murray v. Girratano*, 492 U.S. 1, 10 (1989) (plurality op.)).

Notwithstanding the lack of a constitutional obligation to provide postconviction counsel, in the 1995 Habeas Corpus Reform Act the Texas legislature created a statutory right to representation by "competent" habeas counsel in all death-penalty cases. *See* Tex. Code Crim. Proc. Ann. art. 11.071, § 2(a), (c). In *Ex parte Graves*, 70 S.W.3d 103 (Tex. Crim. App. 2002), the TCCA interpreted article 11.071's use of the term "competent counsel" as referring to habeas counsel's "qualifications, experience, and abilities at the time of his [or her] appointment." *Id.* at 114. Thus, the TCCA held, the statutory guarantee of competent counsel "concern[s] the initial appointment of counsel and continuity of representation rather than the final product of representation," meaning the ultimate "effectiveness" of counsel. *Id.* The TCCA expressly refused to hold that competent counsel's performance must be "constitutionally effective" and declined to turn a "legislative act of grace" into a constitutional right. *Id.* at 113–14; *see also Ex parte Preyor*, 537 S.W.3d 1, 1–2 (Tex. Crim. App. 2017) (Newell, J., concurring) (declining Preyor's request to overrule *Graves* and noting that "courts have uniformly recognized that the *Martinez-Trevino* rule is a federal exception not a constitutional command to correct state court habeas proceedings").

In 2009, the Texas legislature created the Office of Capital Writs, now OCFW, for the express purpose of ensuring that indigent capital-case prisoners receive qualified legal representation, should they desire it, in their first state habeas proceedings. *See* Act of May 29, 2009, 81st Leg., R.S., ch. 781, 2009 Tex. Gen. Laws 1972. OCFW is, by definition, "competent counsel" under article 11.071,

section 2. *See* Tex. Code Crim. Proc. Ann. art. 11.071, § 2(c) (requiring the convicting court to appoint OCFW or, if OCFW cannot accept appointment, "other competent counsel"); *see also id.*, § 2(f) (requiring that non-OCFW counsel be appointed "from a list of competent counsel maintained by the presiding judges of the administrative judicial regions" under Texas Government Code section 78.056).

Texas law guarantees death-sentenced applicants the right to competent counsel in their first state habeas proceedings. Under the statute's plain terms, and as interpreted by the TCCA, "competent" counsel means either OCFW or other counsel who is qualified to accept such appointments under Texas law. Texas has, therefore, made a valid choice to give death-sentenced prisoners the assistance of counsel in their first state collateral review proceeding without affording them the right to counsel whose effectiveness will be judged by Sixth Amendment standards. *Cf. Pennsylvania v. Finley*, 481 U.S. 551, 556, 559 (1987) (rejecting the argument that the procedures of *Anders v. California*, 386 U.S. 738 (1967), should be applied to a state-created right to counsel on collateral review). Here, Cade received exactly what he was entitled to receive under Texas law—competent counsel to represent him in his initial state habeas proceeding. He therefore suffered no deprivation of due process by the TCCA's enforcement of the state-law procedural bar on subsequent habeas applications. This Court should deny his petition.

CONCLUSION

Respondent respectfully asks this Court to deny Cade's petition for a writ of certiorari.

Respectfully submitted,

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