No. 21-5561

In the Supreme Court of the United States

TYRONE CADE,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

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

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes and Rules

I. This Court has Jurisdiction and Should Decide the Federal Issue Presented and Rejected below.

Texas paradoxically argues this Court lacks jurisdiction because the Texas Court of Criminal Appeals ("TCCA") applied state law despite Mr. Cade's contention that the Due Process Clause of the Fourteenth Amendment required that the TCCA revisit and change its construction of that state law. BIO 27-30.

Texas does not dispute that Mr. Cade argued in state court that the "Due Process Clause requires that § 5(a)(1) of [Tex. Code Crim. Proc.] Article 11.071 be interpreted to provide a remedy for the deprivations of Mr. Cade's rights to present his Sixth Amendment claims in initial-review proceedings." St. Hab. Appl. 344. Texas argues that the TCCA's opinion citing § 5(a) precludes this Court's jurisdiction. BIO 27-28. "This Court, however, reviews judgments, not statements in opinions." *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956). Accordingly, it has jurisdiction when the federal question presented "was *either* addressed by, *or properly presented to*, the state court that rendered the decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (emphasis added). Because Texas cannot and does not dispute "that the federal claim was adequately presented in the state system," *Webb v. Webb*, 451 U.S. 493, 496-97 (1981), its argument has no merit.

Contrary to Texas's argument, "it is not necessary that the ruling shall have been put in direct terms." *Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). Where a petitioner raised a constitutional claim against the construction a state statute, "[i]f the necessary effect of the [state court's] judgment has been to deny the claim, that

is enough" to establish jurisdiction in this Court. *Ibid*. Under those circumstances, the "state court decision fairly appears … to be interwoven with the federal law" presented by the petitioner, and this Court presumes "that the state court decided the case the way it did because it believed that federal law required it to do so." *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983).

That presumption is fully justified here. Mr. Cade challenged the constitutionality of the TCCA's holding that the "competency of prior habeas counsel is not a cognizable issue" under § 5(a). *Ex parte Graves*, 70 S.W.3d 103, 105 (Tex. Crim. App. 2002). The TCCA could not have applied § 5(a) and rejected an inquiry into the competence of Mr. Cade's prior counsel unless the state court also rejected Cade's argument that the Due Process Clause required that inquiry.

Texas's argument also fails because it gives conclusive effect to the TCCA dismissal of Mr. Cade's petition "without considering the merits of the claims."[1] BIO 28. This Court, has written of its "duty to … determine for ourselves," *Black*, 351 U.S. at 298, whether a state ground "is independent of the other [federal ground] and broad enough to sustain the judgment." *Enterprise Irrigation Dist. v. Canal Co.*, 243 U.S. 157, 164 (1917); *Long*, 463 U.S. at 1038 ("It is, of course, incumbent upon this Court to ascertain for itself whether the asserted non-federal ground independently and

[1] The quotation is a non sequitur. Mr. Cade does not ask this Court to consider the merits of his claims. Similarly, *Hughes v. Quarterman*, 530 F.3d 336 (5th Cir. 2008), on which Texas relies, BIO 28; *id.* at 29, provides no support for the State's argument because it did not involve the federal question that Mr. Cade presented below and presents again here.

adequately supports the judgment.") (cleaned up, citation omitted). *A fortiori*, a decision that rests solely on state law that the petitioner challenges under the Constitution is not broad enough to sustain the judgment on the constitutional issue presented. *E.g.*, *Oregon v. Guzek*, 546 U.S. 517, 522 (2006) (finding jurisdiction where state supreme court's "opinion suggest[ed] that, in the absence of federal compulsion," the testimony at issue "would not fall within the scope of the state statutory word 'relevant.'").

II. Texas's Brief Fails to Address the Question Presented.

The State concedes that "Texas law guarantees death-sentenced applicants the right to competent counsel in their first state habeas proceedings." BIO 40. Mr. Cade asks this Court to decide whether the Constitution required the TCCA to determine whether the forfeiture of a Sixth Amendment claim was due to the State failing to fulfill that guarantee. Given its concession about state law, Texas wastes its time on cases holding "states have no federal constitutional obligation to provide *any* habeas counsel—much less constitutionally effective habeas counsel." BIO 38 (emphasis in original). Mr. Cade also does not "conflate[] the 'competent counsel' requirement of [Texas law] with the constitutional-effectiveness standard underpinning *Martinez* [*v. Ryan*, 566 U.S. 1 (2011)," BIO 37, a case Mr. Cade mentioned once in support of a different point. Pet. 19.

Mr. Cade acknowledges that "States have no obligation to provide [a collateral] avenue for relief … and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the state supply a lawyer as well." *Pennsylvania v. Finley*, 481 U.S. 551, 556-57 (1987). He also accepts that when a State does

provide counsel for initial-review collateral proceedings, "due process does not 'dictate the exact form such assistance must assume.'" *Dist. Attorney's Office for the Third Judicial District v. Osborne*, 557 U.S. 52, 69 (2009) (quoting *Finley*, 481 U.S. at 559).

Consistent with *Finley* and other cases, Mr. Cade contends the Due Process Clause entitles him to consideration in the state courts of whether his claims were forfeited due to state habeas counsel's incompetence or lack of diligence *under state law*.[2] Pet. 27-28 (citing *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972); *id.* at 30-37.

Alongside the cases Texas relies on, this Court has held that when a state chooses to provide for a right to collateral review, "[f]ederal courts may upset a State's postconviction relief procedures … if they are fundamentally inadequate to vindicate the substantive rights provided." *Osborne*, 557 U.S. at 69. Texas's brief all but concedes that the TCCA's interpretation of § 5(a) renders it fundamentally inadequate to vindicate the State's guarantee of competent counsel.

Texas does not dispute that its statute guaranteeing Mr. Cade competent postconviction representation satisfies this Court's test for creating a liberty interest protected by the Due Process Cause. *See* Pet. 25-29. Texas does not dispute that its law's requirement that appointed counsel "shall investigate expeditiously," *id.* at § 3(a),

[2] Mr. Cade acknowledged in his Petition that both the interests protected by the Due Process Clause are created by state law, and "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, and not the constitutional standard for effective assistance applied in *Martinez*.

gave Mr. Cade a protected liberty interest in having all available grounds for relief presented in those initial-review proceedings.

At the same time, Texas acknowledges that the TCCA has interpreted these provisions to mean that a death-sentenced prisoner is entitled to counsel who are *theoretically* competent based on "counsel's 'qualifications, experience, and abilities *at the time of … appointment*," but not to any *actually* competent representation at the time he must plead his claims and avoid forfeiture. BIO 39 (quoting *Graves*, 70 S.W.3d at 114) (emphasis added). Texas does not dispute that 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, *Graves*, 70 S.W.3d at 105, so that state law fails to provide any remedy for a deprivation of competent representation during initial-review proceedings.

In light of the undisputed fact that Texas law both requires competent counsel for a death-sentenced person to vindicate Sixth Amendment rights and deems the incompetence of such counsel "not cognizable" when a Sixth Amendment claim was forfeited, it is understandable that Texas does not mention the due process standards on which Mr. Cade relies.

Texas also does not dispute that the courts of last resort in States with similar laws have held the Due Process Clause requires a remedy where appointed counsel in initial-review collateral proceedings were incompetent. *See* Pet. 23 & n.9. This Court should reject the State's effort to muddle the issues and take this opportunity

to resolve the conflict between the TCCA's construction of § 5(a) and other States' laws.

III. Texas's Attack on this Case as a Vehicle for Resolving the Question Presented Reflects Fundamental Misunderstandings of the Law and Procedural History.

A. Texas argues this is a "poor vehicle" for deciding whether a state's guarantee to competent post-conviction counsel can require the state's courts to consider a Sixth Amendment claim forfeited by incompetence counsel because Mr. Cade's claims "were not forfeited at all." BIO 30. Texas relies on the federal district court's assertion that "the TCCA adjudicated those claims on their merits on initial habeas review." *Ibid*. Texas either overlooks or badly misunderstands the federal court's reasoning. Texas concedes that Mr. Cade's claims predicated on confusional arousal were not presented on initial habeas review. BIO 31. According to the district court, the omission of those predicate facts places Mr. Cade in a worse position than if he completely failed to present his Sixth Amendment claims in state court.

If a claim presented in a federal habeas petition was "adjudicated on the merits in State court proceedings," 28 U.S.C. § 2254(d), the federal court generally reviews that claim under the standards found in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. 104–132, 110 Stat. 1214. *Cullen v. Pinholster*, 563 U.S. 170, 181-82 (2011). Those standards are "highly deferential" to the state courts and therefore "difficult to meet" for the petitioner. *Id.* at 181 (internal quotation marks and citations omitted). When applying those standards, the federal court considers only the evidence the petitioner presented prior to adjudication. *Id.* at 182.

However, if the district court deemed Mr. Cade's ineffectiveness claims to be procedurally defaulted—either because they were not presented at all, or because the confusional-arousal predicate "fundamentally alter[ed] the legal claim already considered by the state courts," *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986)—the claims were not "adjudicated on the merits," and not subject to § 2254(d)'s deferential standards. *See* 2 B. Means, Postconviction Remedies § 29.6 n.1 (June 2021 update). If Mr. Cade's claims were procedurally barred, then under *Martinez* and *Trevino v. Thaler*, 569 U.S. 413 (2013), Mr. Cade could argue that he is entitled to have those claims reviewed de novo because the default was caused by the ineffectiveness of his state habeas counsel.

Texas fails to mention that the district court said *Trevino* and *Martinez* do *not* "allow [Mr. Cade] to re-litigate with new evidence these two claims."[3] App. 14a. As Justice Breyer has said, a petitioner in Mr. Cade's position

> is in a situation indistinguishable from that of a petitioner like *Trevino*: Each of these two petitioners failed to obtain a hearing on the merits of his ineffective-assistance-of-trial-counsel claim because state habeas counsel neglected to "properly present" the petitioner's ineffective-assistance claim in state court. *Martinez v. Ryan*, 566 U.S. 1, [5] (2012). A claim without any evidence to support it might as well be no claim at all.

Gallow v. Cooper, 570 U.S. 933 (2013) (Statement of Breyer, J., respecting denial of certiorari).

[3] *See also* App. 15a ("Cade may not rely on *Martinez* or *Trevino* to justify a stay in this cause to allow Cade to return to state court and attempt to re-litigate those two claims using new factual allegations and new evidence. Likewise, Cade may not re-litigate those claims in this court using new factual allegations and new evidence.").

Texas's vehicle argument fails to address the opportunity Mr. Cade gives this Court to eliminate the issue presented in *Gallow* from the federal habeas litigation in this case, and in other cases from State's that guarantee death-sentenced prisoners competent representation on collateral review. The district court's decision in this case illustrates how the issue left unresolved in *Gallow* turns the text of § 2254(d), as interpreted in *Pinholster*, against AEDPA's purposes.

The district court said it will apply the deferential standard of § 2254(d) to Mr. Cade's claims because they were "adjudicated on the merits," and following *Pinholster*, it will do so without considering the evidence of confusional arousal because that evidence was not presented to the TCCA before it adjudicated the claims. App. 15a. Mr. Cade disputes the district court's characterization of his claims as having been adjudicated on the merits under *Hillery*, *supra*. He will continue to rely upon *Pinholster* for the proposition that "state prisoners may sometimes submit new evidence in federal court," 563 U.S. at 186, and that this is one of those times. Mr. Cade's Sixth Amendment claims predicated on confusional arousal fall on the "new claims" side of "the line between new claims and claims adjudicated on the merits." *Id*. at 186 n.10. Litigation over this issue will prolong the federal litigation in this case and others, absent clarification of Texas's obligation to provide a remedy for the arbitrary denial of the state-created right to competent post-conviction counsel.

That litigation has already prolonged the proceedings in a bewildering way. The district court described Mr. Cade's claims as existing in a quantum state of being both exhausted and therefore adjudicated and unadjudicated due to forfeiture. App.

14a-15a. That contradictory premise led to the equally contradictory ruling that Mr. Cade "*may not* rely on *Martinez* or *Trevino* to justify a stay in this cause to allow [a] return to state court … using new factual allegations and new evidence," App. 15a (emphasis added), and that Mr. Cade *must* return to state court and

> include in his second or subsequent state habeas corpus application all of the claims that he wishes this federal court to consider … and all of the factual allegations supporting those same claims that he wishes to raise in this court. App. 10a.

Thus, the federal habeas proceedings were stayed and held in abeyance while Mr. Cade drafted a 364-page subsequent state-habeas application under § 5(a) that was mostly made up of claims the district court deemed to have been raised and rejected. *Cf. Castille v. Peoples*, 489 U.S. 346, 350 (1989) ("It would be inconsistent with … principles of comity[] to mandate recourse to state collateral review whose results have effectively been predetermined.").

The added time and complexity of the federal litigation is incompatible Congress's goal in "enact[ing] AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases," *Woodford v. Garceau*, 538 U.S. 202, 206 (2003), and to "'promot[e] comity, finality, and federalism by giving state courts the first opportunity to review a claim, and to correct any constitutional violation in the first instance.'" *Pinholster*, 563 U.S. at 185 (quoting, with omitted alteration, *Jimenez v. Quarterman*, 555 U.S. 113, 121 (2009)).

Unless this Court requires the TCCA to consider whether Mr. Cade's evidence of confusional arousal was forfeited due to incompetent representation, the procedure implemented by the district court in this case—which undoubtedly will be replicated

in others—leads to delay with no prospect of the state court considering the merits of a claim in the first instance. This case presents an ideal opportunity for this Court to advance the goals of speed, comity, and federalism that Texas and the district court have abandoned.

B. Texas also argues "this case is a poor vehicle to reach the question raised" because "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." BIO 3. Here, Texas contradicts itself. The TCCA could not have thoroughly examined trial counsel's failure to raise confusional arousal while expressly stating, as Texas repeatedly points out, BIO at 2, 25, and 28, that it did not consider the merits of the only claims that presented the issue. App. 4a. Thus, Texas devotes the bulk of its brief (pages 4-25 and 32-40), to a proposition that is both false and irrelevant.

Because "[t]his Court . . . is one of final review, 'not of first review,'" *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)), the question is not whether Mr. Cade should prevail on de novo review of his underlying Sixth Amendment claim. It is whether that review should occur either in state court, as Texas argued in *Trevino*, 569 U.S. at 429, *see* Pet. 2, or after years of wrangling in federal court. Rather than "abandon [this Court's] usual procedures in a rush to judgment without a lower court opinion," *F.C.C.*, 556 U.S. at 529, this Court should first articulate Texas's obligation to ensure

that those whom it sentences to death receive the competent post-conviction representation to which they are entitled and on which state law compels them to rely.

Texas's focus on whether prior counsel acted reasonably under *Trevino/Martinez* and *Strickland v. Washington*, 466 U.S. 668 (1984), is misplaced because Mr. Cade's Due Process Clause argument rests, as it must, upon the representation that state law guaranteed, and not a federally imposed standard. *See* § II, *supra*. On remand, the TCCA would be required to determine whether Mr. Cade's initial-review collateral counsel were competent and investigated expeditiously as those terms are used in state law.

This Court's practice is to enunciate a procedural right and leave it to the lower courts to determine in the first instance whether the petitioner should prevail under that right. *See*, *e.g.*, *Trevino*, 569 U.S. at 429; *Martinez*, 566 U.S. at 18; *Atkins v. Virginia*, 536 U.S. 304 (2002) (establishing Eighth Amendment prohibits the death penalty for the intellectually disabled, remanding to Virginia Supreme Court "for further proceedings not inconsistent with this opinion").[4] It should adhere to that practice in this case.

[4] Mr. Atkins never obtained relief from *Atkins*. Rather, a jury found that he was not intellectually disabled, and the circuit court thus reinstated his sentence of death, which the Supreme Court of Virginia overturned due to error in those proceedings. *Atkins v. Commonwealth*, 631 S.E.2d 93, 94 (2006). After that reversal, the case returned to the trial court whereupon Atkins introduced newly discovered exculpatory evidence suppressed by the Commonwealth reflecting that the prosecution had "suborned perjury during Atkins' 1998 capital murder trial." *In re Commonwealth of Virginia*, 677 S.E.2d 236, 237 (Va. 2009). Based on this *Brady* evidence, the trial court ultimately set aside the death sentence and imposed one of life imprisonment without the possibility of parole. *Id.* at 238.

C. Even if this Court were to consider the competence and expeditiousness of initial-review collateral counsel in the first instance, Texas would not prevail. 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. The rule takes into account

> 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.

Id. cmt. 2.

The State Bar of Texas demonstrated its understanding that capital litigation is especially complex and requires specialized knowledge, skill, and training when it adopted *Guidelines and Standards for Texas Capital Counsel* discussed in *Trevino*, 569 U.S. at 425-27.

Texas relies on the federal standard applied in *Martinez* and does not dispute that Mr. Cade's appointed counsel failed the state law standards for competence and expeditiousness. To recap, Mr. Cade was represented by two attorneys who graduated from law school sixteen months before they filed Mr. Cade's initial application. R. App. 6782; *id*. at 6792. Neither had any professional experience. *Ibid*. They received no formal training from their office. *Id*. at 6782. Nevertheless, they were "responsible for all aspects of the litigation," R. App. 6783, "were not paired with a more experienced attorney," R. App. 6792, and received "negligible guidance," R. App. 6793, and "limited supervision," R. App. 6783, from the office's director. One of the attorneys

carried six to fifteen cases. *Ibid*. In the words of their supervisor at the time described in the BIO,

> It was impossible for [the assigned attorneys] to obtain the knowledge and skills necessary to make professionally informed decisions about Mr. Cade's case while simultaneously working on the case, supervising the investigation, and working on their other cases. 2nd Supp. App. 6920.

As Texas pointed out, Mr. Cade was represented by the former Office of Forensic Writs ("OCW"). BIO 38-39. According to the current director of that office, attorney Benjamin Wolff, "Mr. Cade's initial application was not done in a professional way." 2nd Supp. App. 6921. Mr. Wolff described Mr. Cade's initial liability-phase ineffectiveness claim as making "almost no sense" because it included "essentially no evidence of prejudice." 2nd Supp. App. 6915. Mr. Wolff "was even more disturbed by a claim of penalty phase ineffectiveness because it was supported by an affidavit from a sociologist who appeared to say Mr. Cade's race or ethnicity played a role in his criminal behavior" like the testimony condemned in *Buck v. Davis*, 137 S. Ct. 759 (2017). *Id.* at 6916.

That affidavit was filed even though Mr. Cade's counsel considered it "bad," *ibid.*, and "harmful" in the sense that it was "aggravating rather than mitigating" due to its reliance on "racial stereotyping." R. App. 6794. It was filed because the former OCW director had a policy requiring that lawyers "use work-product from the experts [OCW] retained." 2nd Supp. App. 6916. Texas does not dispute Mr. Cade's contention that the former director's policies violated his duty of loyalty. *See* Pet. 34-37.

The principal reason Mr. Cade's application was comprehensively panned is that by the time it was filed "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." 2nd Supp. App. 6921. Texas responds with evidence that Mr. Wolff attempted to develop *after* Mr. Cade's application was filed, BIO 32-35, without acknowledging that Texas law barred consideration of all that evidence, except the testimony of Dr. Silverman. 2nd Supp. App. 6917.

Although Texas conjectures that "[c]ommon sense, not ignorance of the law, likely deterred" Mr. Cade's counsel, BIO 35, this Court's cases forbid "*post-hoc* rationalization[s] of counsel's conduct." *Wiggins v. Smith*, 539 U.S. 510, 526-27 (2003). Texas law of attorney competence, cited above, is in accord and views the matter "from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. One of Mr. Cade's attorneys put it plainly: "we simply did not consider looking into a mental state defense other than the defense trial counsel put on: not guilty by reason of insanity." R. App. 6795. They did not identify the case establishing that Mr. Cade's sleep disorder provided a complete defense to murder. *Ibid*. *See also id*. at 6785.

Although ignorant of the law, counsel could not help but be aware of Mr. Cade's illness. They saw that Mr. Cade had "psychotic symptoms" including being "impaired in his ability to engage in conversation," lethargy, and "hear[ing] voices," R. App. 6784, but did not have Mr. Cade examined by a psychiatrist even though he observed, and even though his novice counsel believed "Mr. Cade's mental illness played a role

in his behavior at the time of the homicides and afterwards," R. App. 6785. *See also id*. at 6794-95.

Counsel knew that Mr. Cade had played tackle football since childhood and might have chronic traumatic encephalopathy but hired no neurologist and hired a neuropsychologist for only one hour's work (without meeting him). R. App. 6784-85.

Counsel knew Mr. Cade had a history of trauma, including watching his father nearly kill his mother with a hammer, but retained no trauma expert. R. App. 6785.

In sum, due to incompetence, Mr. Cade's initial habeas counsel failed to present a well-founded claim that he is not guilty of capital murder, and his trial counsel unreasonably pursued a hopeless insanity defense instead of a viable defense based on unconsciousness.

* * *

Mr. Cade asks this Court to hold that when (a) a State channels Sixth Amendment claims to collateral review, (b) uses explicit mandatory language to guarantee capital post-conviction applicants competent, expeditious representation, and (c) prohibits a represented petitioner from being heard in court except through counsel, the Due Process Clause does not allow the State to deem "not cognizable" claims that counsel were incompetent to enforce the petitioner's Sixth Amendment rights. Other states have reached the same conclusion, even in non-capital cases. *See* Pet. 23. The decision of the TCCA is in conflict with those decisions.

CONCLUSION

This Court should grant certiorari to resolve this important question.

Respectfully submitted,

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