No. 21-950

In the Supreme Court of the United States

KER'SEAN OLAJUWA RAMEY, PETITIONER

v.

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

JUDD E. STONE II
Solicitor General
Counsel of Record

LANORA C. PETTIT
Principal Deputy Solicitor General

NATALIE D. THOMPSON
Assistant Solicitor General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Judd.Stone@oag.texas.gov
(512) 936-1700

QUESTIONS PRESENTED

1. Whether Ramey's *Batson v. Kentucky*, 476 U.S. 79 (1986), claim, which was adjudicated on the merits in state court, can overcome 28 U.S.C. section 2254(d)'s relitigation bar, rebut section 2254(e)(1)'s presumption of correctness by clear and convincing evidence, and warrant federal habeas relief based on evidence and evidentiary theories not pressed in state court.

2. Whether the rationale of *Martinez v. Ryan*, 566 U.S. 1 (2012), allows this Court to carve out an "equitable exception" to 28 U.S.C. sections 2254(d) and 2254(e)(2) for ineffective assistance of trial counsel claims adjudicated on the merits in state court but not adequately "developed" by state habeas counsel.

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BRIEF IN OPPOSITION

Ker'Sean Ramey was sentenced to death for a brutal triple murder he committed while robbing a neighbor's house. Like most federal habeas petitioners, Ramey wishes his direct appeal and state habeas proceedings had been litigated differently.

Ramey first raises a *Batson* claim the state courts rejected, both because it was forfeited and on the merits. The prosecution's stated race-neutral reason for striking a venire panelist was plainly reasonable, and Ramey made no attempt to show pretext. Now, he would like the federal courts to consider a grand theory of invidious discrimination based on juror comparisons and theories never raised in state court.

Second, Ramey does not like how his state habeas counsel litigated his claim that trial counsel was ineffective at the sentencing stage. He would like to support that claim with a swath of new evidence he did not present to the state courts that denied his claim. So, he asks this Court to treat his claim as if it had not been adjudicated on the merits at all, and instead allow him to raise it under *Martinez/Trevino*, which provides a narrow path around procedural default—not the relitigation bar. The Court cannot do that without rewriting AEDPA, which of course it cannot do.

Both claims fail on the merits in any event, whether reviewed *de novo* or, as AEDPA requires, through the lens of AEDPA deference. Nothing in Ramey's petition warrants this Court's review. The petition for certiorari should be denied.

STATEMENT

I. Ramey Murders Three People During a Robbery and Disposes of the Murder Weapons.

On August 25, 2005, Linda Coker went looking for her son, Sam, after he and his girlfriend, Tiffani Peacock, failed to show up for work. ROA.4792-93, 4797. Linda repeatedly called Sam's phone and knocked on his front door. ROA.4798-99. No one answered. When Linda's husband, Steve, returned from work, they went to Sam's home. ROA.4799. The front door was unlocked. ROA.4800. When Linda stepped inside, she was confused to find Sam's roommate, Celso Lopez, lying facedown in a bedroom near the front door. ROA.5265. She wondered why he could not hear her knocking. ROA.4800-01.

As the Cokers entered the kitchen, they began to understand: There they found Sam, lying motionless in a pool of his own blood. ROA.4800-01, 5272. Steve led his wife outside to look for help, ROA.4801, but she refused to leave "without knowing if [her son] was still breathing," ROA.4800. So, Steve went back inside. Only then did he and Linda notice a third body—Tiffani's—lying under the kitchen table. ROA.4800-01, 5268-69. Steve felt that Sam's back was cold to the touch. ROA.4801.

One week earlier, Ker'Sean Ramey and several friends had broken into the home of a neighbor, Kenneth Nairn, to steal weapons. ROA.4783, 4778. After kicking in Nairn's front door, Ramey and others stole roughly twenty-five guns, as well as a hunting knife and loads of ammunition. ROA.4749, 4762, 4779, 4974, 5232-45.

Once in possession of a small armory that could not be traced to him, ROA.4974, Ramey wanted to "hit a lick" on somebody, ROA.4865-66. On August 24, 2005, while bragging about the burglary, Ramey asked LeJames

Norman if he knew someone they could rob. ROA.4865. Norman told Ramey he believed his neighbor, Sam, had one kilogram of cocaine and a stash of cash in his home. ROA.4865-66.

The two began preparing to rob Sam. They called their girlfriends to set up alibis. ROA.4868, 4952, 4989. They swung by a Wal-Mart, where Ramey stole two ski masks. ROA.4869, 4955. And they divvied up weapons from the Nairn burglary: Ramey would carry a short-barrel H&R revolver, and Norman would carry a long-barrel R.G. revolver. ROA.4867-68, 4928, 4938.

Late that night, the two arrived at Sam's home and knocked on the front door. ROA.4824, 4871. When Celso answered, Norman held him at gunpoint while Ramey searched the home for drugs. ROA.4872, 4972. During the search, Norman's gun went off, hitting Celso in the face. ROA.4872, 4929. The wound wasn't fatal, though, and Celso pleaded with Ramey and Norman to help him. ROA.4872, 4929. Ramey told him, "shut the fuck up before you be dead." ROA.4873.

While Celso lay bleeding, Sam and Tiffani returned home. ROA.4873, 4990. Ramey and Norman forced the couple inside, ROA.4873, but Tiffani recognized Norman's voice, ROA.4824, 4960, 4983. Ramey told Norman to "[s]hoot that bitch." ROA.4960. Sam pleaded with the robbers not to. ROA.4824. Norman shot Tiffani anyway. ROA.4824, 4930. Sam grabbed Norman and the two wrestled, ROA.4824, 4960, 4973, until Ramey shot Sam in the side and neck, ROA.4874-75, 4914-15, 4930, 4983. Once Sam had collapsed, Norman shot him three times in the back of the head. ROA.4914-15, 4930, 4939.

The murderers fled to Norman's house across the street, but quickly realized they had left a police scanner at the crime scene. Ramey went back inside to retrieve

it—and to finish the victims off. ROA.4825, 4930, 4974, 4981, 4987. He shot Tiffani in the head once. ROA.4825, 4875, 4914-17. He shot Celso in the back of the head three times. ROA.4825, 4875, 4939, 4990. And he kicked Sam's body to make sure he was dead. ROA.4878. Immediately after, Ramey "was bragging, laughing, and joking" about the murders. ROA.4959-60. He told his cousin he "should have fucked the sexy bitch [Tiffani] before" they killed her. ROA.4878-79, 4938.

When police arrived at the crime scene, Ramey was sitting on the porch at Norman's house across the street "laughing at [the investigators]." ROA.4809, 4825, 4877. At first, Ramey thought he might keep the murder weapons to "pull another lick." ROA.4876. But then he thought better of it. Ramey called his stepfather, Lonnie Lyte, and asked: "If you was to kill somebody what would you do with the guns?" ROA.4828. Lyte said he "would throw them in the river." ROA.4828, 4877. Ramey had his girlfriend drive him to a dam, where he threw the murder weapons into the water. ROA.4820, 4821-26, 4973, 4983.

II. A Texas Jury Convicts Ramey of Capital Murder and Sentences Him to Death.

Pretrial Matters. On December 17, 2005, a Texas grand jury indicted Ramey for burglary of a habitation and capital murder. ROA.3014-3015. Ramey pled not guilty. ROA.3510-11.

Before trial, the trial court conducted six weeks of voir dire proceedings. ROA.3562-4712. The prosecution and defense cycled through two venire panels. ROA.4321. Defense counsel requested a jury shuffle of the first venire panel. ROA.3578, 3581. The prosecution requested a jury shuffle of the second. ROA.4328. When defense counsel requested a race-neutral reason for the State's shuffle, the State offered one—that the bulk of

the jurors who were potentially good for the State "were towards the back." ROA.4330. That explanation was so plainly reasonable that defense counsel withdrew his objection before the trial court even ruled on it: "End of our inquiry, Your Honor." ROA.4330.

Both sides likewise exercised peremptory challenges to individual jurors. The defense exercised fourteen peremptory strikes. *See* ROA.3639, 3657, 3843, 3870, 3960, 4014, 4029, 4219, 4415, 4454, 4530, 4550, 4641, 4643. The prosecution exercised four. See ROA.4190, 4262, 4565, 4691.

As relevant here, the State exercised one of those peremptory strikes on panelist Cheryl Steadham-Scott. During her examination, the prosecution noted she had "basically left blank pretty much all of the" questions dealing with capital punishment on her juror questionnaire. ROA.4685. So, the prosecutor tried to suss out Steadham-Scott's views with a variety of questions: Where would you fall on a sliding scale from 1 (opposed to the death penalty) to 10 (for the death penalty)? Does the criminal justice system need reform? Should capital and non-capital defendants be treated differently? ROA.4686. If you were a legislator, would you change the law on the death penalty? ROA.4687. In a debate for or against capital punishment, which side would you feel more comfortable arguing? ROA.4688-89. If we imagine three groups—for the death penalty, opposed to it, morally conflicted—"[w]here do you think you fall?" ROA.4689.

Each time, Steadham-Scott refused to provide any insight into her own thinking:

- "I'm still not sure where I would fall on [that sliding scale]." ROA.4686.

- "I don't think it really matters what I think about it." ROA.4686.
- The question "wasn't specific enough." ROA.4686.
- "I don't know how I would change [the law]." ROA.4687.
- "I'm not sure which side I would debate." ROA.4689.
- "Hmm, I'm not real sure .... These are three different groups and – I don't know. I really to be honest I don't know." ROA.4689.

The closest Steadham-Scott ever came to offering a view on the death penalty was when she volunteered this statement: "I mean, you're asking me stuff like do I believe in the death penalty. I don't know if I believe in it, you know." ROA.4687. For reasons that seemed obvious to everyone at the time, the State exercised a peremptory strike. Ramey did not object. ROA.4691.

Guilt Stage. Ramey's trial began almost a month later. *See* ROA.4713. It was only on the morning of opening statements that Ramey challenged the strike. ROA.4719. Understandably, neither the court nor the prosecution was prepared to discuss what was going through prosecutors' minds weeks earlier. The prosecutor noted "there wasn't any *Batson* claim, Your Honor. Had there been a *Batson* claim made at the time, I would have certainly addressed that issue." ROA.4719. "It was my understanding if I would have continued to pursue the line of questioning," the prosecutor recalled, "that juror would have most likely been challengeable for cause, but I didn't do it because her questionnaire clearly indicated that she could not impose the death penalty." ROA.4719. Although the prosecutor offered "to go back and resurrect [his] notes," the trial judge was "comfortable" based on his "recollection" about

Steadham-Scott's answers. ROA.4719. Ramey's counsel had no follow-up.

The guilt-stage trial lasted five days. After the close of evidence, the jury deliberated for a little over an hour before convicting Ramey of capital murder. ROA.3188-89, 5038.

Sentencing Stage. Ramey's sentencing-stage trial lasted four days. In hopes of convincing the jury that Ramey would not be a future danger in prison and mitigating factors reduced his culpability, trial counsel presented evidence from Ramey's mother and a psychiatrist. They described Ramey's serious mental illness, his expressions of remorse, and his good behavior in prison. ROA.5150, 5155-56.

The jury heard about the rotating cast of father figures in Ramey's life. ROA.5144–45. That included evidence that as a child Ramey reported abuse by his mother's then-boyfriend, the man she eventually married. ROA.5146. Ramey's mother described the inquiry conducted by the Texas Department of Family and Protective Services and stated the Department established a liaison for the home. ROA.5147. And she recalled a psychiatrist's assessment that "[s]ome of the reasons [Ramey] acted the way he's acted because he's always wanted his father in his life." ROA.5147. Ramey's mother testified that Ramey never had much discipline at home, and said that at some point it "pretty well stopped" entirely. ROA.5146.

The jury also heard that Ramey suffered from emotional and cognitive issues from an early age. ROA.5145–47. He was diagnosed with dyslexia and ADHD around age four. ROA.5145. That evaluation also found him to be emotionally disturbed. *Id.* When evaluated again at age eight, Ramey still exhibited

emotional disturbance and lacked appropriate social skills. ROA.5145–46. And his mother admitted that although mental health professionals recommended treatment and counseling for Ramey, she failed to follow through on those recommendations. ROA.5146-48.

Trial counsel also put on evidence from a future-dangerousness expert, Dr. Mark Kunick. He interviewed Ramey and Ramey's mother and reviewed Ramey's school and job records, the facts of the case, and relevant academic literature. ROA.5155-56. He considered Ramey's history of psychological, familial, and personal problems and his criminal history. *Id.* Based on his assessment, he opined that Ramey would not be a future danger. ROA.5156–57. In closing argument, trial counsel emphasized that Dr. Kunick's evaluation, unlike the State's expert's, was based on his personal examination of Ramey. ROA.5163–64.

The jury unanimously found that Ramey posed a future danger and mitigating circumstances did not warrant a life sentence. ROA.3199-3201, 5182-83. The court sentenced Ramey to death and entered final judgment. ROA.3203-07, 3390-94. Ramey's trial counsel moved for a mistrial for the third time. ROA.3208-35.

III. Texas Courts Affirm on Direct Review and Deny Habeas Relief on Collateral Review.

Direct Review. Ramey appealed his conviction and sentence to the Texas Court of Criminal Appeals ("TCCA"). ROA.3343, 3350. On appeal, he argued that: the jury selection process violated *Batson* (claims 1 and 2); the trial court erred by refusing to instruct the jury on a lesser-included offense (claim 3); the trial court erred by admitting certain evidence (claims 4 through 7); and the evidence at trial was insufficient to support a conviction (claim 8). ROA.2939-40.

The State argued Ramey had forfeited his *Batson* claims by failing to contemporaneously object. ROA.3289-95; *see Batiste v. State*, 888 S.W.2d 9, 17 n.5 (Tex. Crim. App. 1994) ("*Batson* error is subject to principles of ordinary procedural default."). Ramey did not speak up when the prosecution peremptorily struck Steadham-Scott. ROA.4691. That is why neither the prosecution nor the trial court was prepared to discuss the issue when Ramey finally brought it up more than three weeks later, on the first day of trial. ROA.4719.

After the completion of briefing and argument, Ramey's appellate counsel dutifully filed letters informing the TCCA of new federal court decisions that might impact Ramey's appeal. *See* ROA.3402 (citing *Snyder v. Louisiana*, 552 U.S. 472 (2008)); ROA.3408 (citing *Haynes v. Quarterman*, 526 F.3d 189 (5th Cir. 2008)). The TCCA ultimately (and unanimously) affirmed Ramey's conviction and sentence. *Ramey v. State*, No. AP-75,678, 2009 WL 335276, at *1 (Tex. Crim. App. 2009). As to his *Batson* claims, the TCCA recognized that Ramey had likely forfeited them. But it also rejected them on the merits, "assum[ing] *arguendo*" that Ramey had preserved them because they were meritless anyway. *Id.* at *2-3.

Ramey filed a petition for a writ of certiorari, which this Court denied on October 5, 2009. *Ramey v. Texas*, 558 U.S. 836 (2009) (mem.). Ramey's judgment became final for purposes of AEDPA's statute of limitations on that date. 28 U.S.C. § 2244(d)(1)(A); *see Clay v. United States*, 537 U.S. 522, 530-31 (2003).

State Habeas Review. On May 16, 2008, while his direct appeal was still pending, Ramey filed a state habeas application raising twenty-two different claims. ROA.5814-84. He argued: Texas's death penalty scheme

violated the Constitution (claims 1 and 2); the trial court erred in its rulings on various for-cause challenges to potential jurors (claims 3 through 12); the jury selection process violated *Batson* (claims 13 and 14); trial counsel was constitutionally ineffective during voir dire (claim 15); trial counsel was constitutionally ineffective during the punishment phase (claim 16); the trial court erred by refusing to instruct the jury on a lesser-included offense (claim 17); the trial court erred by admitting certain evidence (claims 18 through 21); and the evidence at trial was insufficient to support a conviction (claim 22). ROA.5815-19.

The trial judge—"being thoroughly familiar with the record in th[e] cause as the judge who tried th[e] case"—made detailed findings of fact and conclusions of law. ROA.5956. He recommended the TCCA deny all of Ramey's claims. ROA.5972. As relevant here, the court concluded that Ramey "waived" his *Batson* claim by "fail[ing] to object" to the State's use of a peremptory strike on Steadham-Scott. ROA.5963. Alternatively, the court concluded "[t]he record clearly reflects that . . . the peremptory challenge by the State was based upon [Steadham-Scott's] inconclusive opinions on the death penalty." ROA.4719.

The TCCA set Ramey's case for a hearing on one claim not at issue here. ROA.5991-92. On November 7, 2012, the TCCA denied relief on that claim and summarily denied the rest. *Ex parte Ramey*, 382 S.W.3d 396, 398 (Tex. Crim. App. 2012) (holding "none of applicant's other claims have merit"). The court issued its mandate on December 4, 2012. ROA.2769.

IV. Ramey Asks the Federal Courts to Reopen His State Court Judgment in Federal Habeas Proceedings.

On November 14, 2013, Ramey filed a skeleton habeas application in federal district court. The body of that application—which raised 4 claims in 2 pages—essentially consisted of section headings unsupported by any argument. ROA.30-32. In a footnote, he purported to incorporate the claims filed on direct appeal and in state habeas proceedings. ROA.31 n.1.

More than two years later (December 15, 2015) Ramey filed an "amended" habeas application. This one raised 11 claims in more than 200 pages, ROA.226-440, anchored by 1,000 pages of exhibits, ROA.448-1513. Ramey's new application added claims Ramey had never presented to the state courts and new theories and evidence to support the claims he had presented.

The State moved for summary judgment, arguing that all of Ramey's claims were time-barred, many of them were unexhausted and procedurally defaulted, and all of them were meritless. ROA.1536-1730. Ramey filed a reply brief that was nearly 200 pages long. ROA.1762-1950. The district court requested additional briefing on the timeliness of Ramey's application. ROA.2563. Both sides filed supplemental briefs. *See* ROA.2569-80, 2581-92.

The district court agreed that much of Ramey's application was unexhausted. *Ramey v. Davis*, 314 F. Supp. 3d 785, 800 (S.D. Tex. 2018). It denied Ramey's exhausted claims on the merits.

First, the court observed that Ramey's *Batson* claim turned on factual determinations the trial court was best situated to make. *Id.* at 806-07. It noted that the state trial court made explicit fact findings that: Steadham-

Scott was "repeatedly unable to answer" questions about her ability to apply the death penalty, the prosecution's peremptory strike was based on that fact rather than her "identity as an African-American," there was a "complete failure" to show the strike was racially motivated, there was no evidence "that a number of African-Americans were at the front of the panel" when the prosecution requested a jury shuffle, and the prosecution's reason for requesting a shuffle—that favorable jurors were near the back—was "reasonable" and "racially neutral." ROA.5962-64. Ramey's attempt to create "inferences" of discrimination based on issues he never pressed in state court was impermissible and insufficient. *Ramey*, 314 F. Supp. 3d at 807-08.

Second, the district court rejected Ramey's sentencing-stage *Strickland* claim. That claim had been presented to the state courts, so the district court assessed it under section 2254(d). *Ramey*, 314 F. Supp. at 826-28.

The district court denied habeas relief on Ramey's other claims and denied a certificate of appealability ("COA"). *Id.* at 831. On July 11, 2018, the court entered final judgment dismissing Ramey's claims with prejudice. ROA.2872. The court also denied a motion for reconsideration that Ramey filed under Federal Rule of Civil Procedure 59(e). ROA.2918-19; *see* ROA.2873-87.

The Fifth Circuit granted a COA on just two issues—*Ramey's Batson* claim and a guilt-phase *Strickland* claim. *Ramey v. Davis*, 942 F.3d 241, 246 (5th Cir. 2019). It declined to grant a COA on all other claims, including the sentencing-stage *Strickland* claim Ramey raises in this Court. *Id.*

Appeal to the Fifth Circuit. The Fifth Circuit affirmed. It applied section 2254(d)'s relitigation bar to

Ramey's *Batson* claim, explaining, *inter alia*, that "it is not clearly established that habeas courts *must*, of their own accord, uncover and resolve all facts and circumstances that may bear on whether a peremptory strike was racially motivated when the strike's challenger has not identified those facts and circumstances." *Ramey v. Lumpkin*, 7 F.4th 271, 280 (5th Cir. 2021). It also denied relief on Ramey's guilt-phase *Strickland* claim, *id.* at 284, which is no longer at issue.

SUMMARY OF ARGUMENT

Ramey raises a *Batson* claim based on the prosecution's peremptory strike of a panelist who repeatedly refused to answer questions about her views on capital punishment. The state courts rejected this claim on the merits, but also concluded it was waived under Texas law because Ramey did not raise it contemporaneously. That means Ramey must both overcome procedural default, which he does not attempt to do, and surmount AEDPA's relitigation bar, which he fails to do. The state court's decision involved no unreasonable application of this Court's clearly established precedent, and it did not result from any unreasonable determination of fact.

Even if reviewed *de novo*, Ramey's *Batson* claim fails on the merits. He paints a picture of voir dire pervaded by invidious discriminatory intent, but the record does not support it. Ramey cannot show the state court's not-discriminatory finding was so unreasonable that no fair-minded jurist could agree.

Finally, Ramey urges this Court to grant certiorari on his *Batson* claim because, he says (at 22), circuit precedent is "backsliding." Even if that were true—

though it is not—the supposed errors in other Fifth Circuit decisions are not presented here.

Ramey also asks this Court to grant certiorari on his sentencing-stage *Strickland* claim, on which the Fifth Circuit denied a COA. As the Fifth Circuit correctly concluded, this claim does not deserve encouragement to proceed further, much less warrant habeas relief. The state court denied the claim on the merits and Ramey cannot surmount section 2254(d)'s relitigation bar.

To avoid the relitigation bar—which Ramey does not try to overcome—he asks this Court to apply the reasoning of *Martinez* and *Trevino v. Thaler*, 569 U.S. 413 (2013), to create an "equitable exception" to *Cullen v. Pinholster*, 563 U.S. 170 (2011). The problem with that idea is that *Pinholster* is a statutory decision, not a judge-made rule. It interpreted 28 U.S.C. section 2254(d), and it applies to claims adjudicated on the merits in state court. *Martinez/Trevino*, however, is a doctrine about how a habeas petitioner can overcome procedural default for IATC claims *not* raised in state court. The fit could not be worse. Even setting that aside, Ramey's theory fails to account for section 2254(e)(2), which prohibits habeas petitioners from relying on new evidence except in narrow circumstances not present here.

Moreover, the central rationale of *Martinez/Trevino* is that *some* court should hear a petitioner's substantial IATC claim. That is why this Court recognized a narrow equitable exception to the rule that habeas petitioners are held to their counsel's errors for [1] substantial IATC claims that [2] a state channels to collateral review [3] if the petitioner can show his collateral-review counsel was ineffective under *Strickland*. The concern a substantial

claim will go unheard by any court is necessarily absent for IATC claims adjudicated on the merits in state court.

Ramey alternatively asks this Court to "confirm" that an exhausted claim can be so "fundamentally altered" by new evidence that the federal courts may consider it unexhausted, treat it as procedurally defaulted, and then excuse that default based on *Martinez/Trevino*. In this way, Ramey argues a claim the state courts denied on the merits can be transformed into one they never had an opportunity to consider, and be reviewed *de novo* by the federal courts.

Even if that rationale survived *Pinholster*, Ramey's case would be a poor vehicle for addressing it. He raises additional evidence in support of his IATC claim, but his claim relies on the same basic theory he presented to the state courts. Even if that could fundamentally alter his IATC claim, a federal court should not grant him habeas relief without first requiring him to bring that altered claim before the Texas courts. The Texas courts should have the opportunity to allow him to file a successive habeas petition, recognizing—as justices of the TCCA have already observed—that declining to do so in cases where the federal courts will apply *Martinez/Trevino* undermines federalism.

In any event, Ramey's *Strickland* claims fails whether reviewed under section 2254(d) or *de novo*. The petition for certiorari should be denied.

ARGUMENT

I. Petitioner's *Batson* Claim Does Not Warrant This Court's Review.

Ramey's *Batson* claim does not merit this Court's review. His *Batson* challenge was forfeited at trial under Texas law, as the Texas habeas court recognized, so this Court cannot reach the substantive *Batson* arguments

Ramey raises. The claim also cannot clear AEDPA's relitigation bar, which it must do because the state court alternatively rejected it on the merits. And the claim fails even if reviewed *de novo*.

A. Ramey's *Batson* claim is procedurally defaulted.

The state habeas trial court concluded Ramey's *Batson* claim "was waived by petitioner's failure to object" contemporaneously. ROA.5963-64. A contemporaneous objection requirement is the classic example of a state rule that gives rise to procedural default. *See, e.g.*, *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). Because of this procedural default, Ramey must "demonstrate [1] cause for the default and [2] actual prejudice as a result of the alleged violation of federal law." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). He makes no effort to do so.

Instead of respecting the state courts' finding of waiver, the Fifth Circuit decided the state court was wrong as a matter of Texas law. *Ramey*, 7 F.4th at 278 (rejecting the State's argument "because Ramey's *Batson* challenge was timely under Texas law"). That was error; "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991). This failure to respect the state courts' application of Texas law did not affect the Fifth Circuit's judgment—it went on to reject the claim on the merits, 7 F.4th at 279-81—but the state habeas court's express finding of waiver would prevent this Court from addressing the merits of Ramey's *Batson* claim.

To be sure, the state habeas trial court also recommended rejecting the *Batson* claim on its merits. *See* ROA.5963-64. But that simply means Ramey must

overcome both procedural default and AEDPA's relitigation bar. As this Court has long recognized, a state court may alternatively reach the merits "without sacrificing its interests in finality, federalism, and comity." *Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989). And to the extent procedural default depends on whether the TCCA incorporated the habeas trial court's waiver recommendation, its merits recommendation, or both, the fact-specific nature of that question makes this case a poor vehicle for assessing the substance of Ramey's *Batson* argument.

B. Ramey's *Batson* claim is meritless under any standard of review.

The Texas courts denied Ramey's *Batson* claim on the merits. That means Ramey must show an unreasonable application of this Court's precedent or show, by clear and convincing evidence, that the state court's decision resulted from an unreasonable determination of the facts. 28 U.S.C. § 2254(d). He cannot.

1. The Fifth Circuit did not "ignore" Ramey's section 2254(d)(2) argument.

As now articulated (at 12), Ramey's argument includes three different attempts to clear 2254(d)'s relitigation bar: two different theories under 2254(d)(1) and a factually parallel theory under 2254(d)(2). The Fifth Circuit undisputedly rejected both 2254(d)(1) theories, *Ramey*, 7 F.4th at 279-81, and Ramey wisely does not reprise them here.

Instead, Ramey argues (at 12) that the Fifth Circuit "ignored" his third argument for surmounting the relitigation bar. It did not. What he now denominates his "Second § 2254(d)(1) Argument" and his "§ 2254(d)(2)

Argument" are two sides of the same coin. Both fail because no precedent of this Court says state courts "*must*" conduct a *sua sponte* juror comparison not sought by the *Batson* claimant. On any fair reading, the Fifth Circuit considered and rejected Ramey's argument that the state court's decision "resulted from an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).

The Fifth Circuit can hardly be faulted for not including analysis specific to 2254(d)(2), given that Ramey's own briefing did not explain his 2254(d)(2) argument in terms different than his "Second § 2254(d)(1) Argument." *See* Appellant's Br. 21-22, 58-59; Appellant's Reply 36-40. The Fifth Circuit's opinion may not have separately analyzed section 2254(d)(2), but neither did it cabin its holding to section 2254(d)(1). And in any event, lack of clarity in court of appeals opinions is hardly grounds for a writ of certiorari.

2. The state courts' rejection of Ramey's *Batson* claim was not based on an unreasonable determination of fact.

The habeas trial court recommended denying Ramey's *Batson* claim with the following findings:

> The record clearly reflects that Steadham-Scott's standing on the death penalty was very questionable and the peremptory challenge by the State was based upon her inconclusive opinions on the death penalty and not upon her identity as an African-American. She had even stated that she didn't know if she believed in the death penalty. Based upon her answers to the juror questionnaire and in court, the court finds that the

> use of the States peremptory challenge was not based upon racial motivations.

ROA.5963. Ramey not only must show the state court's adjudication of the claim "resulted in a decision that was based on an unreasonable determination of the facts," 28 U.S.C. § 2254(d)(2), but also must overcome (by clear and convincing evidence) the presumption that its factual findings are correct, *id.* § 2254(e)(1).

Ramey's argument (at 19-21) is that the state court misinterpreted Ms. Steadham-Scott's questionnaire and voir dire answers. *See also* Appellant's Br. 26-27 (arguing "Steadham-Scott's voir dire further established that she would be a fair juror"). AEDPA requires more. Ramey "must show that the state court's ruling . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). He cannot do so.

The state court's decision was "based on" the findings it made, not on the additional theories Ramey now advances, such as his comparison (at 20-21) to seated juror Carol Laza. Ramey has never explained how the state court could have denied his claim "based on" facts that were not put before it and on which it consequently never made findings.

And even if his additional arguments are considered, he would have to show that *no* "fairminded jurist could agree with" the Texas court's decision. *Davis v. Ayala*, 576 U.S. 257, 270 (2015). Even assuming his interpretation of what happened at voir dire is reasonable, so is the Texas court's. That is "all [Texas] needs to prevail in this AEDPA case." *White v. Woodall*, 572 U.S. 415, 427 (2014).

3. Ramey's *Batson* claim fails even if reviewed *de novo*.

Ramey's *Batson* claim would fail even under plenary review. None of Ramey's four arguments shows discriminatory intent.

1. First, Ramey contends (at 17) that "[t]he State's voir dire of Black venire members differed from its inquiry of white panelists." To begin, the fundamental problem for this theory is that most of the juror questionnaires, which provided the starting point for voir dire questions, are not in the record. Juror questionnaires would show why questioning of some panelists was brief while other questioning was lengthy. In any event, Ramey cannot hope to show intentional discrimination based on a juror-comparison theory without record evidence of all comparators.

And in any event, what *is* in the record belies Ramey's theory. The prosecution closely questioned numerous panelists of different races about the burden of proof and their views on capital punishment. *E.g.*, ROA.4132-34. For example, its voir dire of a white male panelist went on for two days and involved lengthy colloquies on those topics. *See* ROA.3699-3701, 3703-09. That panelist was eventually struck for cause. ROA.3711-12. And contrary to Ramey's suggestion (at 19), questions about panelists' upbringing, including whether the panelist was ever spanked as a child, were part of the prosecutor's standard script. *E.g.*, ROA.3714, 3750, 3766, 3788, 3802, 3827, 3847, 4081, 4105, 4113, 4124, 4144, 4168, 4279.

Ramey ignores the numerous panelists of other races who were not selected to sit on the jury. For example, Ramey takes issue (at 17, 19) with the prosecutor's questions about Ms. Steadham Scott's views on the guilt

of famous criminal defendants O.J. Simpson and Michael Jackson. But the prosecutor asked panelists of various races about these well-known acquittals in highly publicized cases. *E.g.* ROA.3660, 3707, 4467, 4519, 4607, 4622. Whether a panelist agreed with two famously dubious acquittals is undoubtedly relevant to a prosecutor's jury selection. There is nothing untoward about this line of questioning.

Ramey also claims (at 17) that questions about religion improperly targeted black panelists. That too is not borne out by the record. The prosecution evidently asked such questions based on references to religion in juror questionnaires. *E.g.*, ROA.4658 (referring to a questionnaire that is not in the record). That happened with black and non-black jurors alike. Indeed, the prosecution struck a white male panelist for cause based on a lengthy inquiry on the topic. ROA.4029-37; *see also* ROA.3980.

2. Next, Ramey argues the State's request for a jury shuffle evidences discriminatory intent. This argument *was* raised in state court, and the state court rejected it. ROA.5961-62. The state habeas trial court found as a factual matter that the shuffle was made not with discriminatory intent, but because panelists the state viewed as favorable had been seated near the back. ROA.5945; *see* ROA.4330. Ramey suggests (at 18) the prosecutor could not have known anything about the panelists beforehand, so that can't have been the real reason for the shuffle, but any absence of evidence means *Ramey* lacks the clear and convincing evidence necessary to overcome 2254(e)(1)'s presumption.

3. Ramey then turns to his central argument: that Ms. Steadham-Scott was questioned more extensively than eventual-juror Carol Laza, who is white. It is true that

Ms. Steadham-Scott's voir dire went on longer than did Ms. Laza's, but the record shows there was nothing nefarious about that.

Comparing the two panelists' questionnaires shows why Ms. Steadham-Scott caused the prosecution concerns not raised by Ms. Laza. Ms. Laza agreed on three key statements, among others: (1) "[w]e must have capital punishment for some crimes," (2) "[c]apital punishment is just and necessary," and (3) "[c]apital punishment gives the criminal what he deserves." ROA.6155-56. Any prosecutor would start out by treating her as a favorable juror for the state. Ms. Steadham-Scott, however, *disagreed* with the third statement—that "[c]apital punishment gives the criminal what he deserves"—and gave no answer on the first two. ROA.6699. A panelist who believes no criminal deserves the death penalty is of obvious concern to the prosecution. Any prosecutor would ask probing follow-up questions to try to identify her views on the death penalty. Here, the prosecutor was unable to get straight answers. *See supra* 5-6. There is no evidence to support Ramey's accusation of invidious discrimination.

4. Finally, Ramey says (at 21) "[t]he State's explanation for striking Steadham-Scott has changed significantly over the years." It has not. At trial, the prosecutor recalled he had used a peremptory strike because Ms. Steadham-Scott's "questionnaire clearly indicated that she could not impose the death penalty." ROA.4719. As the Fifth Circuit correctly explained, "the state habeas court characterized the prosecutor's stated reason for striking Steadham-Scott only slightly differently . . .; it did not alter the basic reason the prosecutor gave." *Ramey*, 7 F.4th at 280. The State as a litigant has not deviated from that same basic reason.

C. Decisions in other Fifth Circuit cases do not call for review of this case.

Ramey also contends (at 22-24) that errors in other recent Fifth Circuit decisions justify review of this one. Even if Ramey were correct about the state of Fifth Circuit jurisprudence—though he is not—*this* case does not involve the supposed errors he seems to be raising.

Ramey's case does not involve whether a state can defend a federal habeas claim based on race-neutral reasons not articulated at trial, as Ramey says (at 23) the Fifth Circuit allowed in *Chamberlin v. Fisher*, 885 F.3d 832, 839-40 (5th Cir. 2018) (en banc). Nor does this case implicate a petitioner's burden when the prosecution gives multiple race-neutral reasons for a strike—the issue Ramey presumably means to raise in his vague reference (at 23) to *Sheppard v. Davis*, 967 F.3d 458 (5th Cir. 2020). And Ramey does not rely on evidence outside the state-court record to show discriminatory intent, the issue in *Broadnax v. Lumpkin*, 987 F.3d 400 (5th Cir. 2021); *see* Pet. 24.

This Court denied certiorari when the supposed errors *were* presented. *See Broadnax v. Lumpkin*, 142 S. Ct. 859 (2022) (mem.); *Sheppard v. Lumpkin*, 141 S. Ct. 2677 (2021) (mem.); *Chamberlin v. Hall*, 139 S. Ct. 2773 (2019) (mem.). There is no reason to grant it in a case that does not present them.

II. Ramey's Sentencing-Stage Ineffective Assistance of Trial Counsel Claim Does Not Deserve a Certificate of Appealability.

Ramey's sentencing-phase IATC claim does not deserve encouragement to proceed further. His request for a *Martinez/Trevino* exception to *Pinholster* is fundamentally flawed. *Pinholster* is a statutory decision about how federal courts review claims adjudicated on

the merits in state court, which are subject to AEDPA's relitigation bar. *Martinez/Trevino*'s animating concern—that a substantial IATC claim might escape review by *any* court—is inapplicable where, as here, the state court did decide the IATC claim. And Ramey's claim would fare no better under the pre-*Pinholster* theory that an exhausted (and denied) claim can be so "fundamentally altered" by new evidence that the federal court may treat it as procedurally defaulted. Finally, Ramey's underlying IATC claim fails on the merits even if reviewed *de novo*, so there is no call for a COA or this Court's review.

A. Ramey's "exception to *Pinholster*" proposal is fundamentally flawed.

Ramey's theory depends on treating AEDPA's statutory requirements as if they were judge-made doctrine subject to equitable discretion. They are not. And even if AEDPA did not bar his request for a *Martinez/Trevino* exception to *Pinholster*'s interpretation of AEDPA—although it does—*Martinez/Trevino*'s fundamental rationale does not apply here.

1. AEDPA, not judge-made doctrine, bars Ramey from relitigating or developing new evidence in support of his sentencing-stage IATC claim.

When a habeas claim was adjudicated on the merits in state court—and Ramey concedes (at 26) this one was—AEDPA limits the federal habeas court's "review . . . to the record that was before the state court." *Pinholster*, 563 U.S. at 180. That is a statutory mandate based on 28 U.S.C. section 2254(d). *See id.* at 181-82. Accordingly, Ramey cannot introduce new evidence in

support of his claim that he received ineffective assistance of trial counsel at the sentencing stage.

Implicitly recognizing as much, Ramey makes a remarkable request: He asks (at 26-30) the Court to extend *Martinez/Trevino*—which recognized a narrow exception to the judicially created procedural default doctrine—to give him a "narrow equitable exception" to *Pinholster*. There are at least three problems with Ramey's proposal.

1. *Martinez/Trevino* applies to procedurally defaulted habeas claims. *Martinez*, 566 U.S. at 9. Ramey treats claims adjudicated on the merits in state court as if they were procedurally defaulted in state court. To apply *Martinez/Trevino* where a claim was adjudicated on the merits in state court would not be a minimal extension of *Martinez/Trevino*—it would rewrite AEDPA's relitigation bar. *See Pinholster*, 563 U.S. at 181-82. This Court has no equitable discretion to do that.

2. Ramey's theory ignores the difference between statutory requirements and caselaw. *Coleman v. Thompson*, 501 U.S. 722 (1991), represents a judge-made rule: "[A]ttorney error does not qualify as 'cause' to excuse a procedural default unless the error amounted to constitutionally ineffective assistance of counsel," and "[b]ecause a prisoner does not have a constitutional right to counsel in state postconviction proceedings, ineffective assistance in those proceedings does not qualify as cause to excuse a procedural default." *Davila v. Davis*, 137 S. Ct. 2058, 2062 (2017) (citing *Coleman*, 501 U.S. 722). In *Martinez*, this Court could carve out an equitable exception to *Coleman*'s rule because *Coleman* itself reflects judge-made doctrine subject to the Court's "equitable discretion." *Id.* at 2066.

Ramey implies (at 26) the Court can treat *Pinholster* just like *Coleman*, asking for "[a] narrow equitable exception to *Pinholster*." But *Pinholster* is a statutory decision interpreting section 2254(d). 563 U.S. at 181-82. As the Court explained, section 2254(d) itself requires federal courts to limit their review of habeas claims adjudicated on the merits in state court to the evidentiary record that was before the state court. *See id.* Statutes cannot be amended through equitable discretion. What Ramey wants would not be an "exception" to *Pinholster*—it would require overruling *Pinholster*.

3. Ramey's argument also ignores AEDPA's limitations on new evidence first introduced in federal court. Unless 2254(e)(2)'s strict requirements are met, AEDPA bars consideration of new evidence any time "the applicant has failed to develop the factual basis of a claim in State court proceedings." 28 U.S.C. § 2254(e)(2). This limitation operates independently from 2254(d), and it applies to procedurally defaulted claims as well as to those adjudicated on the merits. *See Pinholster*, 563 U.S. at 185-86.

To introduce new evidence in support of a claim, a habeas petitioner must fit his evidence within 2254(e)(2)'s strict limits. 28 U.S.C. § 2254(e)(2). Ramey cannot do so. He does not allege his claim relies on "a new rule of constitutional law . . . that was previously unavailable." 28 U.S.C. § 2254(e)(2)(A)(i). And he does not argue his new evidence reflects "a factual predicate that could not have been previously discovered through the exercise of due diligence." 28 U.S.C. § 2254(e)(2)(A)(ii). Nor could he. He cannot both meet that standard and argue—as he does (at 32-33)—that his

state habeas counsel was ineffective for failing to discover the very same facts.

In *Shinn v. Ramirez*, No. 20-1009, this Court is considering a case in which the Ninth Circuit refused to apply section 2254(e)(2) and allowed evidentiary development by a habeas petitioner who had overcome procedural default under *Martinez/Trevino*. That was error, as Texas has explained. *See* Brief for the States of Texas et al. as Amici Curiae 3-11, No. 20-1009. It would likewise be error to allow further evidentiary development of Ramey's sentencing-stage IATC claim.

2. *Martinez/Trevino*'s rationale is inapplicable to IATC claims already adjudicated on the merits in state court.

Ramey argues (at 28-30) that the policy concerns underlying *Martinez/Trevino* are equally applicable here. They are not. *Martinez/Trevino*'s narrow exception rests on a particular concern: that "no court will review" a petitioner's substantial IATC claim. *Martinez*, 566 U.S. at 10-11. Ramey contends (at 29) that a *Martinez/Trevino* carveout is necessary because if state habeas counsel raises an IATC claim but does not adequately "develop" it, "[t]he net effect is the same: collateral-review counsel's deficient performance deprived petitioners of any court review of their substantial IATC claims." That is not so—a claim adjudicated on the merits by the state courts necessarily has been reviewed by at least one court.

This Court has already refused to extend *Martinez/Trevino* to a circumstance much more analogous than this one. In *Davila*, the petitioner urged this Court to extend *Martinez/Trevino* from ineffective assistance of trial counsel to ineffective assistance of appellate counsel. 137 S. Ct. at 2062-63. Here, as in

Davila, "[e]xpanding *Martinez* would . . . aggravate the harm to federalism that federal habeas review necessarily causes." 137 S. Ct. at 2069–70. It is one thing for a federal court to hear a procedurally defaulted IATC claim that was never adjudicated in state court at all. It is quite another for a federal court to grade the state court's papers by again adjudicating a claim the state court rejected on the merits. Section 2254(d) prohibits the federal courts from doing so.

Ramey implies (at 27) that some courts of appeals have extended *Martinez/Trevino* to IATC claims that were adjudicated on the merits in state court. They have not. The cases Ramey cites applied the principle that a claim not "fairly presented" to the state courts is unexhausted and thus may be procedurally defaulted. *See Vandross v. Stirling*, 986 F.3d 442, 451 (4th Cir. 2021); *Dickens v. Ryan*, 740 F.3d 1302, 1319 (9th Cir. 2014) (en banc). These cases support, at most, Ramey's alternative request (at 33) that the Court "confirm that new evidence can fundamentally alter a claim presented in state court, rendering it unexhausted." (Citing *Vasquez v. Hillery*, 474 U.S. 254, 257-60 (1986)). As discussed below, that also does not warrant review.

B. This case would be a poor vehicle for addressing the "fundamentally altered" theory.

As a fallback request, Ramey asks this Court (at 33) to "confirm" that new evidence introduced in federal habeas can "fundamentally alter" a claim rejected by the state courts so that it can be construed as a new, unexhausted claim not subject to the relitigation bar. The Fifth Circuit has indicated that theory did not survive *Pinholster*. *See Broadnax v. Lumpkin*, 987 F.3d 400, 407-08 (5th Cir. 2021). Ramey says it remains viable

and that other courts of appeals have continued to apply it.

1. Even if Ramey were correct, this would be a poor case to address Ramey's preferred interpretation because Ramey's new evidence does not "fundamentally alter" his sentencing-phase IATC claim. As described by the district court, Ramey's sentencing-phase IATC theory has not changed since he raised it in his state habeas petition:

> Ramey's state habeas claim focused on showing a "clear lack of preparation" in the presentation of testimony which caused "a breakdown in the adversarial process." Ramey argued that his trial attorney failed to "investigate the life of the client, uncover any and all evidence tending to counsel for life, including appropriate diagnostic testing and evaluations, and present that evidence to the jury in a clear understandable manner." Ramey criticized trial counsel for "only present[ing] two witnesses," his mother and gerontological psychologist Mark Kunik. Ramey particularly emphasized that trial counsel should have secured the services of a different, better-prepared punishment phase expert.

Ramey, 314 F. Supp. 3d at 826 (citations omitted). The state court denied relief because Ramey "did not explain what experts counsel should have called, provide any indication of which uncalled witnesses should have testified, develop any previously undiscovered mitigating theories, verify what more witnesses could have told jurors, or otherwise substantiate his habeas claim." *Id.* at 826-27.

Ramey contends he has now identified the evidence that was missing, but that does not fundamentally

change the nature of his IATC claim. The claim is better supported, to be sure, but it relies on the same theories—inadequate mitigation investigation and inadequate expert testimony. *See infra* 32-34.

2. Even if Ramey's IATC claim were treated as a new, unexhausted claim, he could not obtain federal habeas relief without first giving the state courts an opportunity to consider his *Martinez/Trevino* argument for overcoming Texas's abuse-of-the writ doctrine. This Court has said that "a district court *must* dismiss [a] 'mixed petition,'" one containing both exhausted and unexhausted claims. *Rose v. Lundy*, 455 U.S. 509, 510 (1982) (emphasis added). The petitioner may then return to state court and present his unexhausted claims. *Id.* at 518-19; *see also Rhines v. Weber*, 544 U.S. 269, 277 (2005).

An unexhausted claim can be treated as procedurally defaulted if "the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Coleman*, 501 U.S. at 735 n.1. The Fifth Circuit applied this principle to Ramey's unexhausted guilt-stage IATC claim, *Ramey*, 7 F. 4th at 281, and circuit precedent has long recognized that Texas's abuse-of-the-writ doctrine generally prohibits successive habeas applications, *see Fuller v. Johnson*, 158 F.3d 903, 906 (5th Cir. 1998). But Texas's abuse-of-the-writ doctrine is subject to its own good cause exception. To be sure, the TCCA held in 2002 that ineffective assistance of state habeas counsel does not suffice, *see Ex parte Graves*, 70 S.W.3d 103, 117 (Tex. Crim. App. 2002), but that was before this Court decided *Martinez*.

In the interest of federalism, justices of the TCCA have expressed openness to treating ineffective assistance by state habeas counsel as cause to allow a successive habeas application. As they have explained:

> After *Martinez* and *Trevino*, many such claims will be reviewed in federal court whether or not this Court first passes on them, since a federal petitioner who can establish ineffectiveness of his initial state habeas counsel will be able to establish "cause" for his failure to raise ineffective trial counsel in his initial state habeas proceedings. Principles of federalism counsel in favor of Texas making the first determination of the merits of any such ineffective trial counsel claim, so that federal review will remain as deferential as possible to our judgments.

Ex parte Alvarez, 468 S.W.3d 543, 551 (Tex. Crim. App. 2015) (Yeary, J., concurring).

Treating such claims as procedurally defaulted deprives the Texas courts of their opportunity to consider them in the first instance. Here, the lower courts denied relief, so there is no need to further address that practice in this case. But a habeas petitioner like Ramey who argues his *federal* procedural default can be excused due to ineffective assistance by state habeas counsel could make the same argument to the *Texas* courts in support of a successive habeas application. A federal court should not grant Ramey habeas relief when he failed to give the state courts the first opportunity to consider his claim. *See Edwards v. Vannoy*, 141 S. Ct. 1547, 1570 (2021) (Gorsuch, J., concurring) ("The law thus invests federal courts with equitable discretion to decide whether to issue the writ or to provide a remedy.").

C. Ramey's sentencing-phase IATC claim fails even if reviewed *de novo* and even if his newly proffered evidence is considered.

Even if *Martinez*'s rationale extended to IATC claims adjudicated on the merits, the extension would not help Ramey because his IATC claim fails even under plenary review. He can show neither ineffective assistance nor prejudice.

1. Ramey's trial counsel's performance at the sentencing stage was well "within the 'wide range' of reasonable professional assistance." *Richter*, 562 U.S. at 104 (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). Counsel put on evidence of the mitigation issues Ramey now argues (at 31) the jury should have heard. *See supra* 7-8. For example, the jury heard evidence Ramey was abused by his mother's then-boyfriend (eventual husband) and that he suffered emotional and developmental disorders from childhood.

To be sure, in denying a COA, the Fifth Circuit observed that "Ramey's federal habeas counsel puts forth a much more detailed analysis of what trial counsel could have—and should have—done at the mitigation phase" than Ramey presented in state collateral review. *Ramey*, 942 F.3d at 257–58. But "[c]ounsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies." *Richter*, 562 U.S. at 107.

Ramey contends (at 30) that "trial counsel conducted *no* independent investigation," but the record does not bear that out. One of Ramey's lawyers, who joined the defense shortly before trial to assist Ramey's lead counsel, averred that while he did not conduct investigation himself, he "was informed of some" conducted by lead counsel. ROA.551. And in open court

counsel referred to mitigation-related discovery and discussed mitigation preparations. *See* ROA.587. Nothing supports Ramey's conjecture that counsel conducted no independent investigation, and it is Ramey's burden to make that showing. 28 U.S.C. § 2254(e)(1). "Even under *de novo* review, the standard for judging counsel's representation is a most deferential one." *Harrington*, 562 U.S. at 105.

2. Even if Ramey could satisfy *Strickland*'s first requirement, he cannot show prejudice. The jury heard about his numerous violent crimes. The night after the triple murder, Ramey burglarized a woman's home. ROA.5080–86. When she returned home, Ramey attempted to hit her with his vehicle. ROA.5082-85. He and several accomplices robbed the Nairn property two more times after the night of the triple murder. ROA.5089–98; ROA.5100–02. And Norman testified that Ramey was planning another armed burglary and had bragged about killing someone with a high-powered rifle during a home invasion. ROA.5125.

Ramey told a jailhouse informant about a sexual assault he committed when he was 16 years old. ROA.5096; *see* ROA.5074-76. He was adjudicated delinquent—the juvenile equivalent of a conviction—based on that assault. ROA.5074-76. Ramey also said he stole laptops from an elementary school and stole a car in Victoria. *Id.* He had a plan to sell drugs to pay for his probation—probation he was serving for vandalizing his alternative-learning school. *Id.*; ROA.5055-60.

And the jurylearned that while awaiting and standing trial, Ramey had several outbursts in prison, once having to be placed in a restraint chair. ROA.5110-17.

Multiple witnesses described Ramey's lack of remorse and callous attitude towards the victims of his

crimes. A jailhouse informant testified that in addition to joking about the robbery-murders, Ramey bragged that he and some friends had shot and killed a Hispanic man during a robbery in Victoria. ROA.5098. Shortly after the triple murder, Ramey said he "should have fucked [Tiffani] before" he and Norman killed her. ROA.4878-79, 4938. And when Sam's mother came looking for her son, discovered the bodies, and summoned the police, Ramey sat across the street at Norman's house "laughing at [the investigators]." ROA.4809, 4825, 4877.

The jury heard the mitigation theories Ramey urges, albeit not supported with all the evidence he now wishes to introduce. Additional mitigation evidence would not have changed the jury's verdict. Ramey cannot show his trial counsel's alleged sentencing-phase failures would have likely changed the outcome.

3. Neither was Ramey's state habeas counsel ineffective under the *Strickland* standard. State habeas counsel raised Ramey's sentencing-phase IATC claim, arguing trial counsel failed to adequately investigate Ramey's background and failed to enlist a qualified future-dangerousness expert. ROA.5859-62; *see* ROA.5966-67. Counsel is expected to "balance limited resources" in formulating litigation strategy. *Richter*, 562 U.S. at 107. Ramey's state habeas counsel's representation was well within the "'wide range' of reasonable professional assistance." *Id.* at 104 (quoting *Strickland*, 466 U.S. at 689).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

JUDD E. STONE II
Solicitor General
Counsel of Record

LANORA C. PETTIT
Principal Deputy Solicitor General

NATALIE D. THOMPSON
Assistant Solicitor General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Judd.Stone@oag.texas.gov
(512) 936-1700

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