IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2018

No. _____

STEVEN ANTHONY BUTLER,

Petitioner,

v.

LORIE DAVIS,
Director, Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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THIS IS A CAPITAL CASE

CAPITAL CASE

QUESTIONS PRESENTED

1. When, in reviewing the two-part claim that trial counsel was ineffective *both* for failing to provide known, relevant information to mental health experts appointed to determine Butler's trial competence, *and* for failing altogether to conduct any investigation of Butler's competence, the court of appeals recasts the claim as solely a failure to provide known information to the appointed experts, then denies that un-presented claim, must the Court exercise its supervisory power to assure the fairness of the judicial process?

2. When, in reviewing the claim that trial counsel was ineffective for failing altogether to conduct any investigation of Butler's mental health afflictions as mitigating evidence, the court of appeals wholly mis-characterizes the mitigating evidence that reasonable investigation would have found and then analyzes the prejudice associated with counsel's deficient performance against a state law framework that was not the law at the time Butler was tried, must the Court exercise its supervisory power to assure the fairness of the judicial process?

PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Respondent, Lorie Davis, Director of the Correctional Institutional Division of the Texas Department of Criminal Justice, was represented by Texas Assistant Attorney General Katherine Hayes.

The Petitioner, Steven Anthony Butler, incarcerated on Texas' death row at the Polunsky Unit of the Texas Department of Criminal Justice, was represented by undersigned counsel, Richard Burr.

There are no other parties to the proceeding below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions and Statutes

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit denying relief on the claims on which this petition is based was entered August 14, 2018. *Butler v. Davis*, ___ Fed.Appx. ___, 2018 WL 3911941 [Appendix 1]. The Fifth Circuit denied rehearing on September 11, 2018 [Appendix 2]. The opinion of the United States District Court for the Southern District of Texas denying these two claims was entered February 28, 2017. *Butler v. Davis*, 2017 WL 784671[Appendix 3]. The district court denied a Fed.R.Civ.Proc. 59(e) motion January 23, 2018. *Butler v. Davis*, 2018 WL 542274 [Appendix 4].

The Texas Court of Criminal Appeals' order denying the claims underlying this petition as an abuse of the writ was entered September 15, 2004. *Ex parte Butler*, 2004 WL 7330937 [Appendix 5].

STATEMENT OF JURISDICTION

The judgment of the Fifth Circuit denying the claims raised herein was entered on August 14, 2018, and rehearing was denied September 11, 2018. *See* Appendices 1 and 2. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

This Petition involves the Sixth and Fourteenth Amendments to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

> [N]or shall any state shall deprive any person of life, liberty, or property, without due process of law....

U.S. Const. amend. XIV.

STATEMENT OF THE CASE

I. Introduction: How the Fifth Circuit Decided the Issues and Why this Court Must Intervene

The two ineffective assistance of counsel claims that the Fifth Circuit reviewed in Mr. Butler's case are straightforward failure-to-investigate claims. The allegations concerning counsel's deficient performance are not even closely contested. With respect to the two mental-health-based matters underlying the claims – Butler's trial competence and mitigating evidence – trial counsel conducted no investigation. None.

The allegations concerning prejudice were more closely contested. With respect to trial competence, Butler's post-conviction mental health expert concluded on the basis of the evidence that could have been found with reasonable investigation that Butler was incompetent. One of the two mental health experts appointed at trial said that if this information had been available he may well have decided that Butler was incompetent. The other said he still would have found Butler competent.

With respect to mitigation, Butler's post-conviction expert found that the previously un-investigated evidence showed that Butler was suffering the early stage of severe Bipolar Disorder at the time of the capital crime and that impairments associated with this illness caused Butler to shoot the victim Velma Clemons impulsively, without any intent to kill her, when she resisted his attempted robbery. Since Butler was tried under the pre-*Penry*[1] Texas death penalty statute, this showing of prejudice had to be measured under that statute and the instructions it mandated – whether the murder of Ms. Clemons was deliberate, whether Butler posed a risk of future danger, and whether Butler's response to any provocation by Ms. Clemons was

[1] *Penry v. Lynaugh*, 492 U.S. 302 (1989).

reasonable. There was no issue that allowed the jury to consider and give effect to mitigation independently or to weigh mitigation in the context all the other evidence. *See Penry*, 492 U.S. at 320-28. Under the pre-*Penry* statute, the un-investigated mitigating evidence in Butler's case could have provided a basis for the jury to find that the murder was not deliberate, thus requiring a life sentence.

Rather than addressing these issues as they were framed and argued by the parties, the Fifth Circuit abandoned that framework and decided what were essentially other issues. With respect to the failure to investigate trial competence, the panel narrowed the issue to one of counsel's failure to provide the pretrial experts with information counsel already had (without investigating Butler's mental health functioning). The panel then denied that claim for lack of prejudice since only one of the pretrial experts even suggested that this information might have changed his opinion on competence.

With respect to the failure to investigate mental health-based mitigation, the panel so mis-characterized the facts related to prejudice that they bore little relation to the facts alleged, and then held that Butler's attempt to show prejudice failed because his numerous "ruthless and depraved crimes [in addition to the capital crime]," *Butler v. Davis*, 2018 WL 3911941 at *5 [Appendix 1], "were so egregious that 'additional mitigating evidence' would be insufficient to sway the jury." *Id*. (quoting *Sorto v. Davis*, 672 Fed.App'x 342, 351 (5th Cir. 2016) (per curiam), and citing *Guevara v. Stephens*, 577 F. App'x 364, 371 (5th Cir. 2014) (per curiam)). The panel's reference to *Sorto* and *Guevara* was to cases tried under the post-*Penry* death penalty statute, Tex. Code Crim. Proc. articles 37.071, 37.0711, which called for the jury to consider "all of the evidence," and determine whether the "mitigating circumstance or circumstances ... warrant[ed] a sentence of life imprisonment ... rather than a death sentence...." Under such a statutory

scheme, Butler's other crimes, which were introduced to show future dangerousness, could have been taken into account in determining whether the mitigating evidence "warrant[ed] a sentence of life." However, the pre-*Penry* statute under which Butler was actually tried did not allow that to be done. If the mitigating evidence under the pre-*Penry* statute fairly called into question the deliberateness of the capital murder, the verdict would have been life no matter how weighty the other-crimes evidence. Thus, Mr. Butler's panel did not consider prejudice in the manner that another Fifth Circuit panel has recognized is necessary – "under the applicable state sentencing scheme," *Ruiz v. Stephens*, 728 F.3d 416, 424 (5th Cir. 2013), *cert. denied*, 572 U.S. 1118 (2014).

The Court should intervene to be sure that Butler, and other people sentenced to death in the states within the Fifth Circuit, are provided review that accurately considers challenges to their capital convictions and death sentences.

II. Course of Prior Proceedings

A. Procedural History

Butler was convicted on November 7, 1988 of the capital robbery-murder of an attendant at a dry cleaners, Velma Clemons, and was sentenced to death on November 10, 1988, in the 185th District Court of Harris County, Texas. The conviction and sentence were affirmed on direct appeal by the Texas Court of Criminal Appeals [CCA], *Butler v. State*, 872 S.W.2d 227 (Tex. Crim. App. 1994), *cert. denied*, *Butler v. Texas*, 513 U.S. 1157 (1995). Butler filed a state application for writ of habeas corpus, which was denied by the CCA's adoption of the trial court's findings of fact and conclusions of law on April 28, 1999.

Thereafter, Butler filed a federal habeas petition in the Southern District of Texas. The district court stayed the federal proceeding to allow Butler to exhaust ten new claims in the state courts, including the two claims presented here. On September 15, 2004, the Court of Criminal

Appeals permitted only one claim to be heard, an *Atkins*[2] claim, and dismissed the remaining nine claims as an abuse of the writ. Appendix 5. On September 4, 2008, the district court denied the petition, finding that the two claims presented here were barred by procedural default. *Butler v. Quarterman*, 576 F.Supp.2d 805, 829-30 (S.D.Tex. 2008).

On April 7, 2015, the Fifth Circuit granted a COA on several of Butler's claims, including the trial ineffectiveness claims at issue here. *Butler v. Stephens*, 600 Fed.Appx. 246 (5th Cir. 2015). On September 9, 2015, the court sustained the district court's denial of all the claims except the trial ineffectiveness claims and remanded those claims for consideration pursuant to the procedures set forth in *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 569 U.S. 413 (2013). *Butler v. Stephens*, 625 Fed.Appx. 641, 660 (5th Cir. 2015), *cert. denied*, 136 S.Ct. 1656 (2016).

On remand, the district court determined that the ineffectiveness claims were without merit, thus precluding the need to consider further whether there was cause under *Martinez* for the procedural default of the claims in state proceedings, and denied a COA. *Butler v. Davis*, 2017 WL 784671 (S.D.Tex. 2017) [Appendix 3]. The district court denied a Rule 59(e) motion thereafter. *Butler v. Davis*, 2018 WL 542274 (S.D.Tex. 2018) [Appendix 4].

On appeal, the Fifth Circuit affirmed the district court's determination, holding, as explained in the Introduction, *supra*, that Butler's claims could not satisfy the merits prong of the test for cause under *Martinez*, because he failed to show prejudice from counsel's deficient performance in not investigating trial competence and the mitigating circumstances arising from his mental illness. *Butler v. Davis*, 2018 WL 3911941 (5th Cir. 2018) [Appendix 1], *reh. denied*,

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[2] *Atkins v. Virginia*, 536 U.S. 304 (2002).

___ Fed.Appx. ___ (5th Cir. September 11, 2018) [Appendix 2].

B. Statement of Facts at Trial

As described in a concurring opinion on reconsideration of the *Atkins* claim by the CCA in 2012, Butler's capital murder was the following: "Applicant shot the clerk [at a dry cleaning business], Velma Clemons, in the stomach with his .38 Special when she refused to give him money. She was alone in the store when applicant came into the cleaners." *Ex parte Butler*, 416 S.W.3d 863, 864-67 (Tex. Crim. App. 2012) (Cochran, J., concurring) (footnote omitted).[3] In his confession, Butler explained what took place:

> I pointed the gun at her and told her to 'give me everything.' The lady told me 'no' and for me to get out of there. I then walked around behind the counter where the lady was at and asked her again to give me everything and she slapped at me and hit me on the right shoulder. I grabbed her around the neck with my left hand as I had the gun in my right hand, I threw her to the ground and then shot her one time.

Id.

In the penalty phase of the trial, the prosecution introduced evidence of nine other robberies to which Butler confessed, some of which occurred before and some after the Clemons robbery-murder. 416 S.W.3d at 464-467. During the course of these other robberies, Butler shot two of the robbery victims, one of whom died, and sexually assaulted two of the other robbery victims. *Id.*

In her response to Butler's original COA application in the Fifth Circuit in 2009, Respondent accurately summarized the evidence the defense presented in the penalty phase:

The defense presented witnesses who testified as to Butler's positive qualities and

[3]In the concurring opinion, the pages between 864 and 868 are un-numbered. These pages recite the facts of the capital crime as well as the nine other crimes to which Butler confessed and which the prosecution introduced in the penalty phase of the trial. Because of the lack of page numbers, it is impossible to cite to specific pages between 864 and 868.

> prior non-criminal behavior[,] 21 RR 930-83[,][4] ... kind, obedient, and trustworthy, with a good reputation and never causing trouble. 21 RR 956, 960, 964-66, 970-72, 976-77, 981-83.
>
> Butler's parents testified they never had any problems with Steven who was a 'very normal, active young man,' helpful to people in the community, and respectful to his elders. 21 RR 931-32, 949..... Steven did not hang out with troublemakers and had a few, close friends. *Id.*... Steven's mother described him as very attentive, always remembering special occasions, and making cards if he lacked money to buy a present. *Id.* at 948.
>
> The Butlers remembered their son as an 'average' student, not an 'A' student. 21 RR 948-49.... While Steven did not graduate from high school, he later successfully obtained a GED. *Id.* at 931-32, 948-49.
>
> The parents testified that Steven entered the Job Corps, received training as a plumber, and obtained work with a plumbing company after becoming certified. 21 RR 932, 950. Steven also enlisted in the Army, was stationed at Fort Benning, served in the Army National Guard Reserves, and received an honorable discharge from the United States Armed Forces. *Id.* at 938-39, 942-43, 950; 24 RR at DX 11....
>
> Butler's parents told the jury they could not think of anything that would have prompted or caused their son's criminal conduct, relating that there were never any indications that Steven had problems. 21 RR 93436, 952.

Butler v. Quarterman, No. 09-70003, Respondent-Appellee's Opposition to Request for Certificate of Appealability, filed August 27, 2009, at 14-17.

C. Statement of Facts Developed in Federal Habeas Proceeding

1. Trial counsel obtained a pretrial, court-ordered competency evaluation but failed to communicate to the appointed experts facts highly relevant to the evaluation.

Joe Cannon had been representing Butler on the capital murder charge in Harris County for nearly seven months when he had a telephone conversation with Butler's mother about the difficulties he was having with Steven. On June 30 1987, Ms. Butler wrote Cannon in reference

[4]The volume of the trial transcript (or "Reporter's Record," hence "RR") that Respondent cites appears in the Electronic Record on Appeal at ROA.6464-6561. The defense penalty testimony is at ROA.6470-6523.

to their telephone conversation, noting, "I am going to have a real good talk to Steve and persuade him to cooperate with you." ROA.1698. The problems that Cannon was having in his relationship with Steven did not improve over the next month, however.

On August 1, 1987, Butler wrote to Cannon accusing him of being a "demon" and letting Cannon know that someone he referred to only as "R. Palmer" had helped him see this:

> Every time that R. Palmer tells me that something is going to happen it happens. Just like the time he told me that Dan Lang[5] was going to betray me, he was right. And he told me about the DA was going to wait out a deal to trap me.... Not only has R. Palmer told me about law enforcement, but he has been telling me things for the last 2½ years. About sports, accidents, girls & etc. But what he's telling me now is scaring me pretty bad. R. Palmer is telling me that you're a demon and you're trying to get me killed. He said I have met you somewhere before but he won't tell me yet. The only thing that he will tell me is that him and me met you last September. But I don't remember, but he's always right! So that's why I can't trust you because I am in the hands of a demon . . . .

ROA.1700-01.

Cannon apparently wrote Butler back,[6] because Butler responded in another letter to Cannon:

> I just got your letter and I want to know how can a man of your age say what on earth is a demon. I'm sure you know. And to call the Bible a fairy tale. Tells me for sure you're nothing but a demon. And ain't no way on earth that I am going to trust a demon with my life. That is firm....

ROA.1703.

Butler's belief that Cannon was a demon who was trying to get him killed was a paranoid delusion, indicative of a psychotic illness. *See* ROA.1684-85 (declaration of Dr. George Woods,

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[5]Dan Lang is the attorney appointed to represent Butler on then-pending non-capital charges in Chambers County, Texas.

[6]Cannon was deceased by the time federal habeas counsel were appointed, and counsel were unable to locate any files from his practice. For this reason, federal counsel were unable to obtain a copy of the letter Cannon wrote to Butler in response to the August 1 letter. The letters from Butler and his mother were found in co-counsel Leonard Barksdale's file.

dated February 27, 2002).[7] Cannon suspected that it was a delusion, because, approximately one year later, on September 15, 1988, he filed two pre-printed form motions to have Butler evaluated by mental health experts for competence to stand trial and for sanity. ROA.1704 (Motion for Psychiatric Examination: Competency); ROA.1705 (Motion for Psychiatric Examination: Sanity). In each motion, the cryptic grounds handwritten in the form by Cannon were similar and clearly based, at least in part, on Butler's delusional belief that Cannon was a demon: "[c]onversations with Defendant's mother; *changing attitudes & delusions in conversations with Defense attorney*." ROA.1704 (competency motion) (emphasis supplied). *See also* ROA.1705 (sanity motion)[8] The trial court granted the motions.

Toward the end of September, 1988, the court-appointed experts, a psychiatrist, Dr. Jaime Ganc, and a psychologist, Dr. Ramon Laval, evaluated Butler. Neither found any indication of a mental or emotional disorder and both concluded Butler was competent to stand trial. However, according to their reports, they based their evaluations solely on their clinical interviews with Butler. They did not talk with Cannon or with his then-newly-appointed co-counsel, Leonard Barksdale. *See* ROA.1706-07, 1708-09 (reports of Dr. Ganc, September 26,1988, and Dr. Laval, September 28, 1988). Thus, they did not know that counsel believed Butler was delusional or why they believed that.

Unknowingly, both doctors obtained a false account from Butler about his early life. As Dr. Ganc reported,

Mr. Butler discussed his past and present personal history. He was born in

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[7]Dr. Woods is a psychiatrist whom the district court authorized Butler's counsel to retain to assist Butler in federal habeas proceedings.

[8]Butler may have had other delusions in addition to those expressed in his letters. Without Cannon or his files, it is impossible to know if there were other delusions known to Cannon.

> Chicago, Illinois, on the West Side. He says that both of his parents were killed when he was two years of age. He stated later that he was told by the people in the orphanage that his parents were both killed by a burglar. This incident took place when the burglar tried to burglarize his parents' home. He says that he spent two years in an orphanage and was transferred to Greenwood, Mississippi. He says that the transfer was done because the orphanage had many rough kids. He says he never established a close relationship with the family in Mississippi and felt they never considered him part of the family. Since then, he says that he eventually moved to Natches [sic], Mississippi, and later on started moving with a family in the same town. He also went back for a short time to Chicago, Atlanta, as well as another town in Mississippi.

ROA.1706. Butler gave a similar account to Dr. Laval. ROA.1708.

This account was false and "suggests an active break with reality, consistent with [Butler's] other psychotic symptoms." ROA.1685 (declaration of Dr. George Woods). Butler was in fact born in Greenwood, Mississippi to Ruth and Terry Butler and lived first in Greenwood, and then in Natchez, Mississippi with his parents until they separated and divorced when he was in his mid-teens. Neither parent was murdered. Butler never lived in an orphanage. Butler never lived in Chicago or Atlanta. Butler never lived or moved with another family. Since neither Dr. Ganc nor Dr. Laval knew the account Butler gave them was false, however, they did not question it or try to determine why Butler was giving such an account of his early history.

Trial counsel clearly knew the account was false, because they presented the testimony of Butler's parents in the penalty phase of the trial, and his parents confirmed that he was their biological son and that he was born in Greenwood, Mississippi. *See* ROA.6471, 6480 (testimony of Butler's father, Terry Butler).[9] However, neither took this information to Dr. Ganc or Dr.

[9]The prosecutor, obviously aware that Butler had told Dr. Ganc and Dr. Laval that he had been adopted by people in Mississippi after his parents in Chicago had been killed, confirmed on cross-examination that Terry Butler and his wife were Steven's biological parents, asking whether Terry was "the natural father of Steven," and whether Steven had been "adopted by you or, I believe, Ruth Butler...." R.6480.

Laval and asked for their assessment of it.

Had Butler's counsel undertaken any investigation focused on their suspicion that he suffered from mental disorder, they would have found much more information.

2. The facts that trial counsel could readily have found and developed had they investigated the signs of Butler's mental illness and his life history were indisputably relevant to the inquiry into Butler's trial competence and to the development of mitigating circumstances.

a. Mental illness

Butler was arrested on September 23, 1986, approximately one month after the murder of Ms. Clemons. Following his arrest and interrogation, he was detained in the Chambers County (Texas) Jail. Just eleven days later, on October 4, 1986, a fellow inmate, Thomas Blanchard, described Butler to jail personnel as "'crazy.'" ROA.1710 (note from Chambers County Jail record). In this same document, it is noted that Butler "talks to himself and answers himself at night." ROA.1711. According to Dr. Woods, "This behavior is characteristic of the schizophrenia-like symptoms that frequently emerge in the early phase of Bipolar Disorder." ROA.1683.[10]

For nearly six months thereafter, Butler was detained in Chambers County. During that time, he was tried on two different non-capital charges. The attorney appointed to represent Butler on these charges was Dan Lang. In an interview with Butler's federal habeas counsel, Lang explained that in their initial contact Butler was helpful and courteous but that after a short while Butler changed. He became "mean," abusive, and uncooperative. He occasionally

[10]It is noteworthy that the inmate who made these observations about Butler being crazy, Thomas Blanchard, testified for the state in the penalty phase of Butler's trial concerning a conversation Butler had with another inmate about how easy it would be to escape from the Chambers County jail (there was no escape attempt). ROA.6414-23. However, since the defense never obtained jail records, they did not know that Blanchard believed Butler was mentally ill and did not question him about this.

threatened Lang.

These problems led Lang to move to withdraw as Butler's counsel. The reasons cited in the motion to withdraw were indicative of Butler's disordered mental functioning:

> 1. The above named defendant has refused to follow the advice of counsel and has informed counsel that he intends to continue to do so;
>
> 2. The above named defendant refuses to cooperate with counsel in putting forth any defense in his behalf;
>
> 3. The above named defendant accuses his counsel of working in a conspiracy with the Court and Chambers County against his interest. This belief, while unfounded, undermines the attorney-client relationship; ....
>
> 5. The above named defendant has on occasions, refused to talk to counsel. When the defendant does talk, it is in an abusive, hostile, and sarcastic manner, including, but not limited to calling counsel 'M-----F----R,' which does not assist in defendant's defense and further undermines the attorney-client relationship.

ROA.1712-13.

Dr. Woods saw yet another sign of an emerging psychotic illness in this account of Butler's relationship with Lang:

> [Butler] tried at first to cooperate with Mr. Lang but the facade of cooperation quickly degenerated into paranoid percepts and behaviors and irritability – recognized in the psychiatric literature as occurring as commonly as grandiosity. Thus, Mr. Butler refused to cooperate with Mr. Lang, believing that Mr. Lang was conspiring against him with law enforcement officials, and withdrew from and refused to talk with Mr. Lang, only emerging at times to relate angrily and abusively to him. These are the classic behaviors of one who is experiencing paranoia and the early onset of the mania produced by Bipolar Disorder.

ROA.1683-84.

Lang's motion to withdraw was denied, and on March 4, 1987, Butler was convicted on the charges that were the subject of his second Chambers County trial. He was sent to the Texas Department of Criminal Justice (hereafter, TDCJ) within two weeks thereafter. On March 17,

1987, TDCJ's Diagnostic II Unit conducted a psychological evaluation and found signs of possible mental illness. ROA 1715-17 (excerpt from TDCJ records). Butler had a "dysphoric mood" and a "sad affect." ROA.1715. As Dr. Woods has explained, a "'dysphoric mood' [is] a specific term for a depressive mood ... and a 'sad affect,' [is] a term of art indicating that Mr. Butler's facial expression was consistent with his dysphoric mood, a consistency that could indicate a mood disturbance." ROA.1684. Psychological testing revealed that Butler was a "depressed paranoid individual who has a high potential for harm to self or others." ROA.1716 (excerpt from TDCJ records). In Dr. Woods' view, "this confirms the agitated depression and paranoia that was apparent in Mr. Butler's behaviors from the time he was arrested to the time of his commitment to TDCJ." ROA.1684. The Minnesota Multiphasic Personality Inventory (MMPI) profile administered by TDCJ appeared invalid, but the examiner qualified that conclusion, "It may represent florid psychosis, low reading ability, or purposefully presenting oneself in a highly unfavorable manner." ROA.1716 (excerpt from TDCJ records). Dr. Woods found that Butler's performance on the MMPI "likely reflected the bewilderment and confusion that is often associated with the early phase of Bipolar Disorder, where the transition from health to illness creates symptoms that the patient is aware of but cannot understand." ROA.1684.

One additional symptom in the constellation of symptoms of mental illness presented by Butler was unknowingly noted by trial co-counsel Barksdale. In Barksdale's interview with Butler just one month before the capital trial, Barksdale noted that Butler weighed 160 pounds, but that previously had weighed as much as 200 pounds. As Dr. Woods explains, "Changes in weight, sleep, and physical activity, known collectively as neurovegetative signs, are often indicators of biological mood disorders." ROA.1680. Accordingly, "this information, in connection with the information about Mr. Butler's behaviors, was of clinical significance in

understanding Mr. Butler's mental condition." *Id*.

The final component necessary to understanding Butler's mental and emotional functioning was noted in the Social Summary prepared on January 26, 1989 by TDCJ personnel when Butler returned to the custody of TDCJ following his capital murder conviction. From the time he was 22 years old – or, from 1984 – Butler used cocaine and amphetamines. ROA.1719 (excerpt from TDCJ records). According to Dr. Woods, this drug usage could very well have been associated with the onset of the early phase of Butler's Bipolar Disorder:

> The changes that a person experiences with the onset of the early phase, especially the paranoia, depression, and agitation, are painful and disturbing. People who have no ready access to medical care often turn to illegal drugs during this time as a (usually unconscious) way of dealing with the pain and the bewildering experiences associated with the early phase.

ROA.1689. Such drug usage in fact makes the symptoms of Bipolar Disorder worse:

> Methamphetamines are frequently used by people suffering from Bipolar Disorder in an attempt to elevate their mood. Ironically, however, significant methamphetamine use can itself induce paranoia and psychosis and can continue to impair and distort mental functioning even for periods when the drug is not taken. Thus, Mr. Butler's resort to methamphetamines had the tragic effect of exacerbating rather than ameliorating his emerging Bipolar Disorder.

ROA.1690.

In sum, all these facts would have been readily discovered had trial counsel undertaken any investigation. In isolation, each might have been ignored as just aberrant behavior or unusual coincidences, but together Butler's

- having conversations with himself,
- belief that his attorney Dan Lang was conspiring with law enforcement officials against him,
- persistent irritability and threatening behavior with Lang,

- assessment by TDCJ as a "depressed paranoid individual who has a high potential for harm to self or others,"
- MMPI scores at TDCJ that "may [have] represent[ed] florid psychosis,"
- delusion that Joe Cannon was a demon out to get him killed,
- consistent accounts over a period of time that he was born in Chicago and orphaned by the murder of his birth parents – accounts which were both false and non-self-serving,
- significant fluctuations in weight, and
- use of methamphetamines beginning in 1984,

would have led to the determination that Butler suffered from the early stage of Bipolar Disorder. ROA.1680-86 (declaration of Dr. George Woods).

Viewed in the context of his life at the time he was arrested, this constellation of symptoms was quite significant. At the time Butler left his hometown in Mississippi in 1982, he had never been involved in any criminal activity. As already noted, no one who knew him from that period of his life could believe that he had committed, or was capable of committing, the crimes with which he was charged in late 1986. *See* ROA.6470-6523 (defense penalty phase testimony).

Taking this into account with all the other signs of mental illness manifested by Butler, Dr. Woods explained,

> Significant changes in previous behavior, including irritability, social deterioration, and involvement in activities reflecting severely impaired judgment, often signify the onset of mental illness. It appears that Mr. Butler began to experience the early phase of Bipolar Disorder sometime prior to the first offense. The prodromal phase of a mental illness is the transitional phase that heralds the onset of symptoms, symptoms that are often not definitive for the specific mental illness that will later emerge, but which signal the transition from

health to mental illness....

> Given that Mr. Butler later developed a full-blown Bipolar Disorder, and that this disorder manifested itself in severely psychotic manic episodes with schizophreniform features – Schizophrenia-like symptoms, often found in Bipolar mood disorders with psychotic features – it is likely that the early phase of this disorder began with an agitated depression and a high level of psychotic paranoia. These symptoms of agitated depression and psychosis are particularly likely to appear in the phases of Depressive and Bipolar Disorder for African Americans. African Americans more commonly manifest agitation instead of retardation in depression, and also have a higher incidence of paranoia. Psychosis is also found more commonly in the depressive phase of Bipolar disorder, as are neurovegetative signs like sleep disruption, catatonia, and changes in weight. Mood disorders are also especially likely to appear in the patient's mid-20's. The features of agitated depression and paranoia, as well as some of the other symptoms of the psychotic mood spectrum of disorders, were apparent in the information that has been gathered about Mr. Butler during the 1986-1988 period. It is not coincidental that these symptoms began to appear and be documentable by this time, because Mr. Butler was in his mid-20's when they appeared. He turned 24 on April 5, 1986.

ROA.1682-83.

b. Impaired Intellectual Functioning

Had counsel engaged in a reasonable investigation of Butler's life history, they would have collected available records about him, including his school records.[11] Those records revealed that Butler's academic performance in school was extremely poor and brought into question his intellectual abilities.

As the district court previously found in connection with the litigation of Butler's *Atkins* claim,

> The state court's finding ... that the drop off in Butler's academic performance began in the fifth grade and was affected, beginning at age 12, by substance abuse, ignores Butler's marginal grades in second and third grade. It also ignores the testimony of Sibyl Strozier, the teacher who referred Butler for a special

[11] *See Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (noting that "educational history" should be obtained in conducting a reasonable mitigation investigation).

> education assessment in sixth grade, that she would not have made the referral based on lack of motivation. 'It had to have been something serious.' 4 WH at 66. Ms. Strozier explained that a special education referral 'was a very long and drawn-out process. It was not something that a teacher went into lightly because it required ... quite a lot of paperwork.' *Id.* at 59....
>
> Butler did not demonstrate normal learning through age 10. His one normal year in the fourth grade was an aberration from an otherwise abysmal elementary school record.

Butler v. Quarterman, 576 F.Supp.2d at 815-816. The district court summarized accurately what Butler's school record demonstrated, and what his friends and teachers testified to in the *Atkins* hearing—that his academic struggles were a function of his intellectual limitations, *not* his lack of effort or disengagement beginning in the fifth grade.

Accordingly, had counsel undertaken the kind of investigation that was called for at that time in capital cases, they would have found evidence that called for investigating Butler's intellectual abilities as well as his mental health. That investigation would have led to evidence that Butler had at the very least, as Dr. Woods concluded in 2002, borderline intellectual functioning.[12]

3. Had trial counsel undertaken a reasonable investigation, they would have obtained expert opinion (a) that Butler was incompetent to stand trial, and (b) that Butler's mental illness and borderline intellectual functioning called for a negative answer to the deliberateness special issue in the penalty phase of trial.

According to Dr. Woods, the information that is still available about Butler's relationship with and ability to relate to his lawyers is sufficient to conclude that Butler likely was incompetent to stand trial. ROA.1688-89. Butler's unshakable delusional belief was that Joe

[12]In connection with the *Atkins* claim, the district court found, as it noted in its opinion denying relief on the remanded ineffectiveness claims, "that Butler suffers from sub-average intellectual functioning although he did not meet all of the requirements for a finding that he is intellectually disabled." *Butler v. Davis*, 2017 WL 784671 *4 n.2 [Appendix 3].

Cannon was a demon, whose purpose was to get him killed. Because of this, he refused to cooperate with Cannon. Leonard Barksdale's entry into the case as co-counsel one month before trial started changed nothing. ROA.1694 (Barksdale recalling that Butler "did not appear very interested in what was going on"). As Dr. Woods explained,

> Mr. Butler's lack of cooperation with his attorneys was due, at least in part, to his paranoid delusion about Joe Cannon, his agitated depression, his impaired intellectual ability, and the confusion he experienced at that time in his life. Except for his impaired intellectual ability, these misperceptions and disabilities were produced by the early phase of Mr. Butler's emerging Bipolar Disorder. As such, he lacked the ability to consult with his lawyer with a reasonable degree of rational understanding. His lack of cooperation was not by choice.

ROA.1689.

Butler's emerging mental illness and impaired intellectual ability also could have led to a life sentence. As Dr. Woods explained, during the two years preceding the series of crimes that Butler confessed to, Butler was likely feeding a growing drug addiction that began as an unconscious attempt to ameliorate the emerging symptoms of the early stage of Bipolar Disorder. ROA.1689. Butler's limited intellectual functioning would likely have made "the early phase of Bipolar Disorder more difficult. His limited ability to understand and gain insight would have made the bewilderment of the early phase even worse than it would have been for a person of normal intellectual abilities." ROA.1684.

Butler's employment was, at best, intermittent during this time, so he likely developed a need for more money than he could earn to support his drug usage. He admitted to TDCJ personnel that he sold marijuana. ROA.1719. When this source of income, along with whatever income he earned from his spotty employment, was inadequate, Butler could very well have turned to robbery as an alternative means of generating enough money to buy drugs. As Dr. Woods explained, the jury may well have found this combination of factors significantly

mitigating:

> Had the jury known that the series of crimes [Butler] confessed to were produced by this mechanism – the onset of Bipolar Disorder, coupled with an unconscious attempt to cope with this illness through the use of illegal drugs – the non-capital crimes may well have been mitigated. The motive for these crimes would at least have been seen as having its source in illness, rather than malice.

ROA.1690.

Seen from this perspective, the capital murder was "an attempted robbery gone bad." *Id*. That is precisely what Butler's confession showed it to be. *Id*. As Dr. Woods explained, the "going bad" was itself a product of Butler's illness:

> When Ms. Clemons resisted Mr. Butler's attempted robbery and began to hit him, Mr. Butler's paranoia likely triggered a defensive response that did not reflect deliberation or planning. That he only shot her once, and that it was a shot to the abdomen rather than the head, suggests that the shooting was not a deliberate, intentional act of homicide.

ROA.1691.

REASONS FOR GRANTING A WRIT OF CERTIORARI

As the Questions Presented and Introduction to the Statement of the Case make clear, the reasons for granting certiorari have to do with the Fifth Circuit's process of review in this case, not with the underlying claims of ineffectiveness. The underlying claims have merit, but there is nothing about them that justifies the Court using its limited time to review the claims on their own merit. What is worthy of the Court's time is the process the Fifth Circuit employed to deny a certificate of appealability on the claims. The panel recast the first claim, cutting out the major part of the claim, then denied the reconfigured claim for lack of prejudice. The actual claim could not reasonably have been denied on that basis in ruling upon Butler's motion for a certificate of appealability. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (COA must be granted if "reasonable jurists could debate whether (or, for that matter, agree that) the petition

should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further"). The panel so distorted the material facts pertaining to prejudice with respect to the second claim that they bore no relation to the facts that were pled, then denied the claim for lack of prejudice both because of this distortion and because the panel analyzed prejudice under the wrong Texas capital sentencing scheme. The actual claim could not reasonably have been denied on this basis in ruling on a COA application.

The analysis of the claims and the Fifth Circuit's decision with respect to them that follows is to show the Court that, without its intervention, Mr. Butler will have been deprived of meaningful appellate review and to urge the Court to call out the kind of work that threatens meaningful appellate review for other capital habeas petitioners in the Fifth Circuit.

I. The panel misconstrued the claim of ineffectiveness in investigating trial competence, narrowing it to a claim of trial counsel's failure to correct the appointed mental health evaluators' factual mis-impressions concerning Butler, and then denied that claim – which was *not* the claim Butler presented – for lack of prejudice.

With respect to the ineffectiveness claim concerning trial competence, Butler argued that trial counsel performed deficiently in two respects: First, they failed to conduct a reasonable investigation into Butler's competence and to provide the fruits of that investigation to the appointed trial experts. Second, they failed to provide to the experts relevant information that they knew based on interactions with Butler and his parents. Butler was prejudiced because there is a reasonable probability that a reasonable investigation would have led experts relying on the facts developed in such an investigation to conclude that he was incompetent to stand trial.

To support the finding of prejudice, Butler demonstrated through the opinion of postconviction expert Dr. George Woods that the facts revealed by a reasonable investigation

into Butler's competence would have supported the conclusion that he was incompetent to stand trial. *See* Statement of the Case, II.C.3, *supra*. Counsel for Butler presented this same information, along with Dr. Woods' opinion concerning Butler's incompetence, to the two appointed experts who had examined Butler's competence before trial. One of them, Dr. Laval, explained how critical it would have been to have this information when evaluating Butler.[13] He also concluded that if he had known this information, "it is possible" that he would have concluded that Butler "was not competent and required psychiatric treatment, including the use of anti-psychotic medication...." *Id*.

This claim is thus a claim of failure to investigate mental illness as it relates to trial competence, as well as a failure to communicate already-known information to experts. However, the panel analyzed the claim as if it were solely a failure to communicate already-known information to the experts. Thus the panel explained that "Butler argues that his trial counsel ... failed to provide critical information bearing on competency to the experts that evaluated him," and, "Butler argues that his trial counsel was ineffective because he failed to present certain information to the experts evaluating Butler for mental competency." *Butler v. Davis*, 2018 WL 3911941 *4. For this reason, the panel assessed prejudice by focusing exclusively on whether the "additional evidence would have changed the experts' opinions," *id*., *not* on whether there is a reasonable probability that an expert undertaking an evaluation in light of the evidence produced by an adequate investigation would have found that Butler was incompetent. Since only one of two experts indicated the additional evidence might have

[13] "[I]n any evaluation, but particularly a competency evaluation of a defendant who does not have a well-documented history of psychiatric treatment, does not exhibit overt psychotic symptomatology or is not acutely manic, depressed or psychotic, as was the case with Mr. Butler, collateral information suggesting that the defendant is manifesting paranoid thoughts or delusional ideas that involve his own attorney is of marked significance." ROA.1723 (letter from Dr. Laval to federal habeas counsel).

changed his mind, the panel found no prejudice with respect to the recast claim of ineffectiveness. *Id.*

The panel's recasting of this claim solely as a failure to communicate known facts to experts doomed the claim, because it allowed the trial experts' views to control disposition of the claim. By contrast, the prejudice associated with a claim that trial counsel failed to investigate mental health evidence is *not* properly measured by determining whether the trial experts would have changed their opinions had they been apprised of the information discovered through reasonable investigation. The way prejudice is measured with respect to such a claim is to examine what postconviction experts, when provided such information in the course of evaluating the petitioner anew, concluded.

The Court's analysis in *Rompilla v. Beard*, 545 U.S. 374, 392-93 (2005), modeled this mode of analysis. Referring to the facts concerning the petitioner's mental health that were discovered in the course of reasonable investigation in post-conviction proceedings, the Court explained:

> The jury never heard any of this *and neither did the mental health experts who examined Rompilla before trial*. While they found 'nothing helpful to [Rompilla's] case,' *Rompilla*, 554 Pa., at 385, 721 A.2d, at 790, their postconviction counterparts, alerted by information from school, medical, and prison records that trial counsel never saw, found plenty of 'red flags' pointing up a need to test further. 355 F.3d, at 279 (Sloviter, J., dissenting). When they tested, they found that Rompilla 'suffers from organic brain damage, an extreme mental disturbance significantly impairing several of his cognitive functions.' *Ibid*. They also said that 'Rompilla's problems relate back to his childhood, and were likely caused by fetal alcohol syndrome [and that] Rompilla's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired at the time of the offense.' *Id*., at 280 (Sloviter, J., dissenting).

(Emphasis supplied.)

On this basis, driven by the postconviction experts' findings – not by whether the pretrial

experts would have changed their opinions – the Court concluded,

> It goes without saying that the undiscovered "mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of [Rompilla's] culpability," *Wiggins v. Smith*, 539 U.S., at 538 (quoting *Williams v. Taylor*, 529 U.S., at 398), and the likelihood of a different result if the evidence had gone in is 'sufficient to undermine confidence in the outcome' actually reached at sentencing, *Strickland*, 466 U.S., at 694.

545 U.S. at 393.

This manner of measuring prejudice with respect to a claim of ineffectiveness in investigating mental health issues is unremarkable. Pretrial experts conduct their evaluations on the basis of the information they have and reach conclusions on the basis of that information. All of us tend to be reluctant to admit that we had inadequate information to support the conclusions we have previously reached, even in the face of new, relevant information. We tend to defend the views we previously expressed. Thus, habeas courts focus on the conclusions reached by post-conviction mental health experts conducting a new evaluation on the basis of adequate investigation as the most accurate measure of the prejudice associated with inadequate pretrial investigation.

In Mr. Butler's case, the panel failed in this respect, ignoring altogether the conclusion reached by the post-conviction expert that Butler was incompetent to stand trial and focusing entirely on whether the pretrial competency experts would have changed their opinions in light of evidence they had not been provided. While the pretrial experts' opinions respecting the new evidence are generally irrelevant, where a pretrial expert expresses equivocation about his pretrial opinion in light of the new evidence, that equivocation can bolster the finding of prejudice in a case, as here, where the postconviction expert has found that adequate investigation supports a finding of trial incompetence or mental health mitigation.

Accordingly, the Court should intervene to make clear to the Fifth Circuit that Butler's claim had to be reviewed as he presented it – as a failure to investigate mental health evidence – and that the prejudice inquiry for such a claim must focus on the findings by postconviction experts whose evaluation is based on the fruit of professionally reasonable investigation.

II. The panel so distorted the material facts pertaining to prejudice with respect to the claim of ineffectiveness in investigating mitigation that the facts bore no relation to the facts that were pled, then denied the claim for lack of prejudice both because of this distortion and because the panel analyzed prejudice under the wrong Texas capital sentencing scheme.

The panel's view of the facts supporting the ineffectiveness in investigating mitigation claim bore almost no relation to the facts as presented by Mr. Butler. This was the panel's view:

> Butler now relies on evidence that is too speculative to be of any use, despite having had decades to develop a theory and discover additional evidence. His entire theory comes from Dr. Woods's expert report. Dr. Woods's conclusions are hedged so thoroughly that they cannot provide any reliable basis for Butler's theory. The best he could say was that 'Butler was likely feeding a growing drug addiction' and 'likely developed a need for more money than he could earn,' so he 'could very well have turned to robbery as an alternative means of generating enough money to buy drugs.' But Dr. Woods also reported that Butler sold marijuana and was employed in the oil industry, undermining his conclusion that Butler would quickly run out of money. Even more problematic is the total absence of evidence from Butler himself that the purpose of his crimes was to feed a drug addiction. If all Butler can now present in support of his theory is conjecture, reasonable jurists would not debate that the additional evidence would not have swayed the jury.

Butler v. Davis, 2018 WL 3911941 at *5.

This statement is inaccurate in every respect.

Contrary to the panel's account, the evidence was not "too speculative to be of any use," and was not based on expert conclusions that were "hedged so thoroughly that they cannot provide any reliable basis for Butler's theory." *Id*. Moreover, the basis for Dr. Woods' opinion *was not* that Butler had a drug addiction that he fed with the proceeds of robberies. *Id*. Rather,

Dr. Woods meticulously documented and explained the severe, mental illness-based devolution of Mr. Butler, from a person whose "family and friends he had growing up in Mississippi never knew him to engage in any violent acts and did not think he was capable of doing so," ROA.1681 (declaration of Dr. George Woods), to the person who committed a capital murder and a string of other violent crimes just four years later in Texas, in 1986. Working backward from TDCJ's death row diagnosis in 1995 that Mr. Butler suffered a serious psychotic illness, Bipolar Disorder, to 1986, when his behavior changed dramatically after he moved to Texas and he committed a string of violent crimes, Dr. Woods' conclusion was not in any way "speculative" or "hedged" or limited to "drug addiction." His conclusion was quite clear and highly relevant to mitigation: "Mr. Butler began to suffer from a full-blown Bipolar Disorder by 1995 [as diagnosed by TDCJ]. It is just as clear that he suffered from the symptoms of his disorder from at least 1986 until 1995." ROA.1686.

Far from speculation, Dr. Woods explained the course of Mr. Butler's illness:

- "[I]t is likely that the early phase of this disorder began with an agitated depression and a high level of psychotic paranoia." ROA.1682. Dr. Woods detailed the basis for this conclusion:

> African Americans more commonly manifest agitation instead of retardation in depression, and also have a higher incidence of paranoia. Psychosis is also found more commonly in the depressive phase of Bipolar disorder, as are neurovegetative signs like sleep disruption, catatonia, and changes in weight. Mood disorders are also especially likely to appear in the patient's mid-20's. The features of agitated depression and paranoia, as well as some of the other symptoms of the psychotic mood spectrum of disorders, were apparent in the information that has been gathered about Mr. Butler during the 1986-1988 period. It is not coincidental that these symptoms began to appear and be documentable by this time, because Mr. Butler was in his mid-20's when they appeared.

ROA.1682-83.

- Mr. Butler told the pretrial evaluating experts as well as TDCJ staff that, prior to his arrest in 1986, he used marijuana daily, and also used barbiturates, cocaine, and methamphetamines. ROA.1683. However, Mr. Butler's drug usage was not an addiction. Rather, it was connected to and produced by the onset of his mental illness. As Dr. Woods noted, "It is likely that Mr. Butler's drug usage reflected an attempt to cope with the deterioration in mental stability and the onset of symptoms consistent with the early symptoms of Bipolar Disorder." *Id*. Dr. Woods explained that this often happens, because "[t]he changes that a person experiences with the onset of the early phase, especially the paranoia, depression, and agitation, are painful and disturbing...." ROA.1689. Thus, "[p]eople who have no ready access to medical care often turn to illegal drugs during this time as a (usually unconscious) way of dealing with the pain and the bewildering experiences associated with the early phase." *Id*.[14]

- While Mr. Butler's turning to methamphetamines was not unusual – "[m]ethamphetamines are frequently used by people suffering from Bipolar Disorder in an attempt to elevate their mood," ROA.1690 – the consequences were devastating, because "significant methamphetamine use can itself induce paranoia and psychosis and can continue to impair and distort mental functioning even for periods when the drug is not taken." *Id*. Thus, Mr. Butler's ingestion of methamphetamines "had the tragic effect of exacerbating rather than ameliorating his emerging Bipolar Disorder." *Id.*

[14]In connection with Butler's drug usage, Dr. Woods explained that Butler's employment "was, at best, intermittent during this time, so he likely developed a need for more money than he could earn...." ROA. 1690. Thus, Butler likely turned to robbery "as an alternative means of generating enough money to buy drugs." ROA.1690. The panel questioned this conclusion: "Dr. Woods also reported that Butler sold marijuana and was employed in the oil industry, undermining his conclusions that Butler would quickly run out of money." 2018 WL 3911941 *5. Despite the panel's apparent assumption that Butler's oil industry job was high-paying, the record shows that this job involved moving pipes around in a pipe yard. Transcript of *Atkins* Hearing, Vol. III, at 18-19 [not included in the ROA]. Butler's financial circumstances fully supported Dr. Wood's inference.

The panel not only misapprehended, but also erroneously disparaged, this strong evidence of debilitating mental illness and the drug usage it led to as, "too speculative to be of any use, despite [Butler] having had decades to develop a theory and discover additional evidence." 2018 WL 3911941 *5.[15] To be sure, Dr. Woods did note that "[t]he history that federal habeas counsel have been able to develop for Mr. Butler for the time period preceding his incarceration on Texas death row is not as full as one would like to have to reach a definitive conclusion about Mr. Butler's mental functioning prior to his commitment to death row." ROA.1680. However, Dr. Woods went on to explain that "habeas counsel has provided me with enough data to develop a clinical impression about Mr. Butler's functioning [at the time of the crime in] August, 1986...." *Id*.

Indeed, Dr. Woods found sufficient corroboration for his diagnosis of Bipolar Disorder and its consequences for Mr. Butler in the following:

- Within eleven days of his arrest, Mr. Butler was seen as "crazy" by another jail detainee because Butler talked to himself. ROA.1683. Dr. Woods explained, "[T]his behavior is characteristic of the schizophrenia-like symptoms that frequently emerge in the early phase of Bipolar Disorder." *Id*.

- Over the next five months, Mr. Butler's relationship with the lawyer on his non-capital charges "degenerated into paranoid percepts and behaviors and irritability," "the classic behaviors of one who is experiencing paranoia and the early onset of the mania produced by

[15]In sharp contrast, the federal district court found credible and persuasive Dr. Woods's evaluation of Mr. Butler in connection with a determination to grant equitable tolling of the statute of limitations due to Butler's ongoing mental illness. The court found that "Dr. Woods presents a well-documented history of paranoia, severe psychological disorder, and refusal of pharmacological intervention[,] ..., mental illness [which] has significantly disrupted [Butler's] communication with both state habeas counsel and his current attorneys." *Butler v. Quarterman*, 4:01-cv-00075, Docket No. 54 (May 7, 2002 S.D.Tex.).

Bipolar Disorder." ROA.1683-84.

- Following Mr. Butler's conviction on the non-capital charges, TDCJ documented Butler as "depressed and paranoid and as having a 'high potential for harm to himself or others'" – "[a]gain, ... confirm[ing] the agitated depression and paranoia that was apparent in Mr. Butler's behaviors from the time he was arrested to the time of his commitment to TDCJ." ROA.1684.

- "Mr. Butler's further descent into full-blown Bipolar Disorder was manifest in his dealings thereafter with Joe Cannon, his lead attorney in the capital prosecution," whom he believed was a "'demon,'" and with the pretrial mental health experts appointed at Cannon's request to evaluate Butler's competence, to whom he gave an objectively false life history – all of which "suggest[ed] an active break with reality, consistent with his other psychotic symptoms." ROA.1684-85.

- Finally, Mr. Butler mentioned to his lawyers pretrial "that his weight fluctuated quite a lot," ranging between 160 and 200 pounds. ROA.1685. Dr. Woods noted, "In combination with the other symptoms indicating the onset of Bipolar Disorder, [these] changes in weight provide further confirmation that he was in fact becoming mentally ill." *Id*.

In erroneously disparaging Butler's failure to find additional supporting evidence "despite having had decades" to do so, the panel also noted "the total absence of evidence from Butler himself that the purpose of his crimes was to feed a drug addiction." 2018 WL 3911941 at *5. Dr. Woods addressed both of these matters, explaining that, by the time the first mental health-related investigation took place – in federal habeas proceedings – counsel were "unable to find employment and other records for the 3-4 year period preceding the capital offense, and they have been unable to locate any witnesses who knew Mr. Butler well during this period of

time." ROA.1681. This evidence was unavailable, because "the passage of time has led to the destruction or loss of records," and because, "during the pendency of habeas proceedings Mr. Butler has continually been incompetent to assist counsel in the most elemental ways, such as helping to identify and locate friends and co-workers who were close to him during that four-year period." *Id*.

Thus, the panel had no reason to disparage either the mitigating evidence or the efforts on behalf of Mr. Butler to develop the available mitigating evidence. Despite the difficulties, Dr. Woods found that he had "enough data to develop a clinical impression about Mr. Butler's functioning [at the time of the crime in] August, 1986...." ROA.1680.

Given the panel's misapprehension of the mitigating evidence, it is not surprising that the panel went on to find that the evidence was insufficient to show prejudice. The panel explained that the newly-developed mitigating evidence "does not even begin to explain [Butler's] ruthless and depraved crimes," 2018 WL 3911941 *5, pointing to cases in which "the 'severity of the offense' and an 'apparent pattern of criminal activity' were so egregious that 'additional mitigating evidence' would be insufficient to sway the jury." *Id*. (quoting *Sorto v. Davis*, 672 Fed.App'x 342, 351 (5th Cir. 2016) (per curiam), and citing *Guevara v. Stephens*, 577 F. App'x 364, 371 (5th Cir. 2014) (per curiam)).

This analysis is in error, first, because it misapprehended the state law framework under which the sentencing decision was made in Mr. Butler's case, and second, because it failed to recognize the strength the un-investigated mitigating evidence would have had within that framework.

Unlike the cases cited by the panel, involving crimes that occurred long after the Texas death penalty statute had been revised to add a mitigation special issue, the pre-*Penry* statute

under which Mr. Butler was tried had no vehicle for the consideration of mitigation. Only three special issues were considered by the sentencing jury – whether the crime was committed deliberately, whether the defendant was likely be a future danger, and whether there was any provocation by the victim. A new mitigation issue was added in the wake of *Penry*:

> Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.

Tex. Code Crim. Proc. arts. 37.071, 37.0711. This issue afforded a vehicle for not only considering and giving effect to mitigation but also for considering whether the mitigation was "sufficient" to call for a life sentence "taking into consideration all of the evidence...." In a case tried under this post-*Penry* statute, it would relevant to consider, as the panel did in Butler's case, whether the new mitigating evidence might have any effect in light of the aggravating evidence. However, *this analysis has no place in a case like Mr. Butler's*, because the jury was not asked to consider mitigating evidence in relation to all the other evidence. The only relevant analysis is whether the mitigating evidence could have affected the findings on any of the three special issues.

The evidence that Butler suffered a severe mental illness that made him paranoid and agitated – causing him to react angrily to behaviors he misperceived as threatening – could well have led the jury to find that the capital murder of Velma Clemons was a product of Butler's mental illness. Butler encountered resistance by Ms. Clemons, who told him to get out and hit him, behaviors which he likely misperceived as threatening. And, while the mitigating evidence would not have led the jury to answer "no" to the future dangerousness issue, it could have caused the jury to see all of Butler's crimes not as "ruthless and depraved," as the panel

characterized them, but as a byproduct of the severe mental illness he suffered. Critical to this analysis, Butler's mental illness *did not* – as the panel mistakenly suggested – interfere with his ability to "meticulously plan[]" his crimes, 2018 WL 3911941 *5, or to make "specific threats to kill people if they attempted to stop him...." *Id*. Rather, his mental illness impaired his perceptions, judgment, and ability to modulate his reactions when the victims of his crimes did things that he did not expect. For these reasons, the jury could well have answered the deliberateness issue with respect to the murder of Ms. Clemons, "no." As Dr. Woods explained,

> When Ms. Clemons resisted Mr. Butler's attempted robbery and began to hit him, Mr. Butler's paranoia likely triggered a defensive response that did not reflect deliberation or planning. That he only shot her once, and that it was a shot to the abdomen rather than the head, suggests that the shooting was not a deliberate, intentional act of homicide.

ROA.1691.

Accordingly, when the facts and then-mandated sentencing procedures are viewed accurately, it is plain that trial counsel's failure to investigate mitigation prejudiced Mr. Butler, at least enough to warrant a certificate of appealability.[16]

[16]As a coda to its ungrounded review of Butler's claims, the panel cited an alternative basis for denying this claim: "the rule of uncalled witnesses." 2018 WL 3911941 *5 n.4. However, Butler's claim is not a claim of ineffectiveness for failing to call a witness. It is a claim based on counsel's failure to investigate. The failure to investigate mitigation often includes the failure to utilize expert witnesses to evaluate possible mental illness. That fact has never resulted in the conversion of a failure-to-investigate-mental-health claim into a failure-to-call-a-witness claim. In suggesting otherwise here, the Fifth Circuit ignored its own longstanding authority. *See, e.g., Lockett v. Anderson*, 230 F.3d 695, 710-16 (5th Cir. 2000); *Lloyd v. Whitley*, 977 F.2d 149, 159-60 (5th Cir. 1992).

CONCLUSION

For these reasons, Steven Butler prays that the Court grant a writ of certiorari to review the decision of the Unite States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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