No. 18-7091

IN THE

Supreme Court of the United States

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

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

Petitioner Steven Anthony Butler was convicted of capital murder and sentenced to death in Texas state court for shooting and killing an unarmed woman during his fifth of ten robberies committed during a murderous crime spree in the summer of 1986. He currently petitions for a writ of certiorari to review the unpublished decision of the Fifth Circuit Court of Appeals that denied him a certificate of appealability on a procedurally defaulted claim of ineffective assistance of trial counsel. *Butler v. Davis*, 745 F. App'x 528, 2018 WL 3911941 (5th Cir. Aug. 14, 2018). This case presents the following questions:

1. Whether a writ of certiorari should issue where the Fifth Circuit's decision fully comports with AEDPA and this Court's established precedent and Butler merely disagrees with the result?

2. Whether jurists of reason could debate the district court's disposition of Butler's claim on procedural grounds?

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Cases

Statutes, Rules, and Constitutional Provisions

BRIEF IN OPPOSITION

Petitioner Steven Anthony Butler[1] seeks review of the Fifth Circuit Court of Appeals' decision denying a certificate of appealability (COA) on his claim alleging ineffective assistance of trial counsel (IATC) for failure to investigate and raise Butler's mental state (1) to have him declared incompetent to stand trial, and (2) as mitigating evidence during sentencing.[2] However, Butler fails to present any compelling reason to grant review. In 2008, the district court held that Butler procedurally defaulted his IATC claim and denied habeas corpus relief.[3] On remand in 2017, the district court concluded that Butler "cannot overcome his default" based on *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), and again denied habeas relief.[4] Finding that no reasonable jurist could debate whether Butler's defaulted claim of ineffective trial counsel is "substantial," the Fifth Circuit Court of Appeals denied a COA. Pet. App. 1 at *4-6. This Court should

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1 Respondent Lorie Davis is referred to as "the Director."

2 *Butler v. Davis,* 745 F. App'x 528, 2018 WL 3911941 (5th Cir. Aug. 14, 2018) [Butler's Appendix ("Pet. App.") 1], *r'hrg. denied,* No. 18-70006 (5th Cir. Sept. 11, 2018) [Pet. App. 2].

3 ROA.967-75; *Butler v. Quarterman,* 576 F. Supp. 2d 805, 827-30 (S.D. Tex. Sept. 4, 2008).

4 ROA.1754-65; *Butler v. Davis,* No. H-07-2103, 2017 WL 784671 (S.D. Tex. Feb. 28, 2017) [Pet. App. 3].

deny certiorari review because the Fifth Circuit's decision is consistent with established constitutional and statutory principles, and the district court's disposition of Butler's IATC claim could not be debated by jurists of reason.

STATEMENT OF THE CASE

I. Factual Background

A. Capital crime, indictment, and assessment of competency

On August 27, 1986, Butler shot and killed Velma Clemons, a cashier at a dry-cleaning store, during a robbery in Channelview, Texas. *See Butler v. State*, 872 S.W.2d 227, 231 (Tex. Crim. App. 1994). He was later apprehended and arrested on September 23, 1986. ROA.2285, 2357. The arrest was made after Butler fired shots at a deputy sheriff and fled in a truck which he stole at gun point. ROA.2576-611. Following his arrest, Butler gave a signed and written confession in which he admitted to shooting the deceased in the stomach during a robbery. ROA.6660 (State's Exhibit [SX] 33).[5]

Butler was charged with committing capital murder. ROA.2063. The trial court appointed Joe Cannon, who is now deceased, as lead defense counsel and Leonard Barksdale as second chair counsel. As summarized by the Fifth Circuit:

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[5] Butler also confessed to committing several similar armed robberies and other violent offenses in the months before the capital murder. *E.g.*, ROA.6671 (SX 38); ROA.6677-78 (SX 40); ROA.6684 (SX 47); ROA.6771-73 (SX 90A).

> Before trial, Butler corresponded with his trial counsel and exhibited some unusual behavior referencing "demons" and a non-existent person, "R. Palmer, who he seemed to rely upon for his actions. [ROA.7389-90, 7392]. About a year after the first reference to "R. Palmer," Butler's trial counsel requested examinations to determine whether Butler was sane and competent. [ROA.2080, 2082]. Two experts—psychiatrist Jaime Ganc and clinical psychologist Ramon Laval—each independently evaluated Butler on two different days in September 1988. The reports are similar, both premised only on the interviews with Butler. [ROA.7421-22 (competency evaluation by Dr. Ganc); ROA.7424-25 (competency evaluation by Dr. Laval)]. Each indicates information from Butler about his childhood, specifically that he was in an orphanage in Illinois and later adopted by the Butler family of Mississippi. The rest of the expert's comments are unremarkable except that each concluded, based on Butler's then-present cognitive functioning, that Butler was competent to stand trial.
>
> The record does not indicate that Butler's trial counsel took any further steps to challenge Butler's competency after receiving these reports. Butler stood trial about two months later[.] He did not raise the issue of competency on direct appeal.

Pet. App. 1 at *1 (citations added).

B. Evidence at trial

The State proved that on August 27, 1986, Butler entered a Fashion Cleaners in Harris County, Texas, and told the casher, Velma Clemons, he was there to pick up some clothing. ROA.5551-52, 5804-05. Ms. Clemons went to look, but when she returned and said she could not find the order, Butler pulled out a .38 caliber handgun and demanded the store's money. ROA.6660. When Ms. Clemons resisted by slapping at Butler and hit his right shoulder, Butler grabbed her around the neck, threw her to the floor, and shot her. ROA.6660.

Witnesses saw Ms. Clemons who, though mortally wounded,[6] said she had been attacked and pointed at Butler as he fled the scene. ROA.5711-25, 5744-52. Butler was chased by several men, but got to his car and sped away. ROA.5599, 5603-04, 5638-39, 5647, 5721-25. A passing motorist saw Butler drive off in a 1974 light blue Buick and followed long enough to get the license plate number. ROA.5603-08, 5638-41. Police ran the license plate number, LBQ-612, found the vehicle registered in the name of Larry Davis, and learned that Davis sold the car to Butler in 1984. ROA.5546-47, 5770-79.

Butler remained at large for nearly a month until his arrest on September 23, 1986. At the time, Butler had been driving his 1974 Buick and had a pair of Texas license plates, number LBQ-612, in the trunk. ROA.5813-14. After being taken into custody and advised of his rights, Butler gave a written statement confessing to the robbery and shooting. ROA.5803-06; ROA.6660 (SX 33). Butler also stated that after he left the dry cleaners, he drove to his apartment and watched the news on television. ROA.6660. On learning that a witness had gotten his car's license plate number, Butler moved his car to a different parking lot, stole a set of license plates off a vehicle in another parking lot, and used them to replace the ones on his car. ROA.6660.

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[6] Ms. Clemons died from a gunshot wound to her abdomen that penetrated her liver, destroying it. ROA.5855, 5859-60.

C. Evidence at punishment

1. The State's case

The State presented evidence of a string of ten different robberies[7] that Butler committed between May 2, 1986, and September 23, 1986, during which he killed two clerks in separate robberies, shot a third clerk in another robbery, and sexually assaulted clerks at gunpoint in two other robberies.[8]

On May 2, 1986, Butler committed armed robbery at the Stop-N-Go on Sheldon Road in Channelview, Texas, and killed the clerk, Jefferson Johnson, by shooting him in the stomach with a .38 revolver. ROA.6053-57, 6067-84, 6095, 6132-34. In a post-arrest voluntary statement, Butler stated that he parked behind the store, then walked around to the front and saw that the clerk was the only person inside. ROA.6684 (SX 47).

> I walked up to the counter with the gun (a .38 special blue steel with a snub nose barrel) out in my right hand and asked for the money. The clerk then put both hands on the counter and just looked at me. I again asked him for the money and I cocked the gun and told him "now." The clerk did not say anything and just stood there with his hands on the counter. I then pulled the trigger

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[7] The Fifth Circuit described that "Butler's pattern in these armed robberies included approaching convenience store clerks and demanding money from the cash register at gunpoint, or pretending to purchase something and demanding money once the register was opened. Butler generally did not hold the clerk at gunpoint until no one else was in the store. Sometimes he parked his car across the street from a store, in one instance stating that he left the radio on so it would not get stolen." *Butler v. Stephens*, 625 F. App'x 641, 643 (5th Cir. Sept. 9, 2015).

[8] The following summary of the evidence comes in part from *Ex parte Butler*, 416 S.W.3d 863, 864-67 (Tex. Crim. App. 2012) (Cochran, J., concurring), which the Fifth Circuit cited. *See* Pet. App. 1 at *1 n. 1.

> on the gun and walked out of the store and then ran to my car that I had parked in back.

ROA.6684. Butler did not claim to have been provoked or threatened by Johnson, or that his shooting of Johnson was not deliberate. *See id*. A customer contacted police after finding the deceased laying on the floor behind the register, bleeding from his mouth and stomach. ROA.6053-59. Fingerprints at the crime scene were later identified as Butler's. ROA.6074-84, 6089. During a search of Butler's apartment following his arrest for capital murder of Velma Clemons, police found a newspaper article regarding the investigation of the robbery and murder of Jefferson Johnson. ROA.6687 (SX 48).[9]

The State's case included evidence that on July 3, 1986, Butler committed armed robbery of Renee Wallace, a clerk at a Stop-N-Go store on River Road in Channelview. ROA.6166-75. When Butler found the clerk alone, he pointed a gun at her, took out all the bills when she opened the cash register, then left. The store was equipped with a security camera that took a photograph of Butler during the robbery. ROA.6724 (SX 67). This Stop-N-Go

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[9] During closing argument, the State urged the jury to consider this evidence in returning an affirmative answer to the special sentencing issue on deliberateness, which asked, "Was the conduct of [Butler] that caused the death of [Velma Clemons] committed deliberately and with the reasonable expectation that the death of [Ms. Clemons] or another would occur?" ROA.6526-27, 6556. The State argued that Butler "knew exactly what the result of [his] conduct would be [in shooting Ms. Clemons] because back in May he did it to somebody else, another clerk in a convenience store. He pulled the trigger before, and he knew what would happen because he had a newspaper article about that death in his apartment." ROA.6526.

was just a few blocks from where Butler robbed and killed Jefferson Johnson two months earlier.

On July 28, 1986, Butler returned to the Stop-N-Go store on River Road and again robbed the clerk, Renee Wallace, at gunpoint when she was alone. ROA.6178-87. Butler asked the clerk if she remembered him, told her, "You know what I'm here for," and took all the bills when she opened the register. The store's security system again photographed Butler. ROA.6726 (SX 68). On his way out, Butler said the store "needed a better security system."

The State's case included evidence that on August 17, 1986, Butler committed armed robbery of Jean Holloway, the clerk at a Maxi-Stop 2 convenience store off Interstate 10 in Mont Belvieu, Texas. (ROA.6009-29, 6033-46). Ms. Holloway testified that Butler entered the store three times before finding her alone. Butler walked in quickly, grabbed her, pulled out a gun, and stuck it in her ribs. He demanded "all the money" and pulled out the bills when she opened the cash register. As Butler was leaving the store, he told Ms. Holloway, "If you touch the phone, I will kill you." Butler gave a written statement to police confessing to the robbery. ROA.6671 (SX 38).

The day after his capital murder of Velma Clemons, on August 28, 1986, Butler committed armed robbery of Gwen Blackwell, the clerk at C.W.'s Exxon Quick Stop in Winnie, Texas. (ROA.6217-27). Ms. Blackwell testified that Butler entered the store, brought a Coke up to the register, and fumbled with

some change before saying he did not have enough to pay for it. After Butler took out more change, she opened the cash register. Butler pulled out a gun, said he would "take it all," and started jerking bills out of the register. He kept his gun pointed at Ms. Blackwell the whole time until he left the store. In his post-arrest statement, Butler said he parked on the north side of the interstate and entered the store when he saw there were no customers. ROA.6772 (SX 90A). Butler pulled out a .38 caliber revolver, pointed it at the lady clerk, and said, "Give me your money." She did so, giving Butler approximately $350.

On September 8, 1986, Butler robbed at gunpoint 73-year-old Boyd Ford, the clerk at a Phillips "Freeway 66" gas station in Orange County, Texas. ROA.5958-72, 5988-91. In a post-arrest statement, Butler reported that he parked east of the gas station, pulled up the hood of his car, and put on emergency flashers to make it look like he had car trouble. ROA.6677 (SX 40). After he entered the store, a couple drove up so Butler went outside to the telephone and acted like he was talking to someone until the customers left. Butler came back inside, pulled out a gun and pointed it at Mr. Ford's chest, and told him, "Give it up old man." Mr. Ford testified that he told Butler there was not much money, but that Butler could have it all. ROA.5963-64. Butler took $120 and walked out, then ran down the service road to his car.

Two days later, on September 10, 1986, Butler robbed and shot Madonna Benoit, the clerk at an Amoco In-and-Out Minimart in Jennings, Louisiana.

ROA.6229-49, 6260-65. Butler entered the store when the clerk was alone, talking on the telephone. Butler came up to the register, pulled out a gun, pointed it the clerk, and said, "Give me your money and you won't be hurt." The clerk opened the register and Butler took the money. As Butler was walking out, the clerk picked up the telephone and told her girlfriend she had just been robbed. Hearing that, Butler came back to the counter and shot the clerk in the hip, then exited the store.

The following week, on September 17, 1986, Butler committed aggravated robbed and aggravated sexual assault of Winnie Silcox, the clerk at a Fina Station in Winnie, Texas. ROA.6284-307, 6310-13, 6445. Ms. Silcox testified that Butler came into the store after midnight when she was alone. He walked to the cooler to get a beer, but she told him she could not sell him one because it was after midnight. Butler pulled out a gun, put it to her head, and demanded the store's money. Ms. Silcox opened the register and complied. Butler then said he wanted to get into the safe, which was in the storeroom. He made Ms. Silcox walk to the back of the storeroom, then jerked her down by her hair, unzipped his pants, and said, "Come on, bitch, do it like you do your boyfriends. You're going to suck my dick." She did so, as Butler kept pressing his gun to her head; after he ejaculated, she got sick and started throwing up. After Butler was done, he left the store. Butler confessed to committing the robbery and sexual assault in a post-arrest statement.

ROA.6771-72 (SX 90A).

On September 23, 1986, Butler committed aggravated robbery and aggravated sexual assault of Frances Hartman, the clerk at C.W.'s Exxon Quick Stop, the same store as his August 28th robbery. ROA.6314-36, 6426-28**.** Ms. Hartman testified that she was alone in the store when Butler came "busting" in the front door, holding a gun, and said, "I told you I was coming back, you mother*** bitch." Ms. Hartman had never seen Butler before and had no idea what he was talking about. Butler demanded that she open the cash register and he scooped out the money. Butler then grabbed her by the wrist, took her into the utility room, and told her, "You've got five seconds to get down on your knees." When Ms. Hartman cried, "Oh, God. I don't think I can do this," Butler pointed his gun at her head and kept it there while she performed oral sex on him. Butler then made Ms. Hartman turn around and bend over the sink as he sexually assaulted her. After that, Butler grabbed her hand and took her across the store to the walk-in cooler where he raped her again. He then dragged Ms. Hartman to the bathroom and made her perform oral sex on him again. When Butler finished, he left the store. Butler gave post-arrest statement confessing to the robbery and sexual assault. ROA.6772 (SX 90A). Butler was convicted of aggravated sexual assault with a deadly weapon enhancement and received a life sentence. ROA.6710-18 (SX 61, SX 64).

The same night as the immediately preceding crimes, Butler fired his

weapon at a peace officer, stole a truck at gunpoint, and led police on a high-speed chase that ended with his arrest. ROA.6354-402, 6407-13. Chambers County Sheriff's Deputy Gordon Andrews testified that he stopped his patrol car to check on an abandoned Buick and discovered the license plates were stolen. Deputy Andrews heard a broadcast over the patrol car radio announcing a robbery had just occurred at C.W.'s Exxon Quick Stop nearby and almost immediately saw Butler walking towards him from that direction. Butler ignored the deputy's request to come over to the patrol car, so Andrews pulled out a service revolver and ordered Butler to stop. Butler fired two shots towards the officer, hitting his patrol car. Deputy Andrews, who was struck in the face by shattering glass, shot at Butler. Butler ran to a gas station, stole a pickup truck, and raced down Interstate 10 towards Houston with officers in pursuit. He eventually tossed his gun out the car window and pulled over. Butler was arrested and taken into custody, and gave a voluntary statement regarding the events. ROA.6773 (SX 90A).

Finally, Thomas Blanchard, an inmate at the county jail, testified that in September 1986, he overheard a conversation between Butler and another inmate about how easy it would be to take the keys away from a female jailer and escape. ROA.6419.

2. The defense's case

The defense team called Butler's family members and neighbors to

testify regarding his good character and background. Butler's parents testified they never had any problems with their son, who was a "very normal, active young man," helpful to people in the community, and respectful to his elders. ROA.6471-72, 6489. By their account, (1) Butler was a "regular fellow" who did the "average things that boys did," such as going to movies, skating, and football games, (2) he did not hang out with troublemakers, (3) he had a few close friends, (4) he played football on the local high school team, ran track in junior high and high school, and played basketball with neighborhood friends, (5) he drove a car and was trustworthy with it, never having an accident or even a speeding ticket, (6) he was very attentive, and (7) he always remembered special occasions and made cards if he lacked money to buy a present. ROA.6471, 6473-74, 6488.

Butler's parents further testified that their son (1) was an "average" student, not an "A" student, (2) he did not graduate from high school, but later successfully obtained a GED, (3) he entered the Job Corps, received training as a plumber, and obtained work with a plumbing company after becoming certified, (4) he lived in Gulf Port during his service in the Job Corps, but kept in touch with his family by calling or writing, (5) he enlisted in the Army National Guard Reserves, was stationed at Fort Benning, and honorably discharged from the United States Armed Forces, and (6) after moving to Houston in 1984, he would return to Mississippi every few months to visit

family and neighbors. ROA.6471-72, 6478-83, 6488-90, 6805. Butler's mother described having a good relationship with her son, one in which they "could communicate." ROA.6490. She could not think of anything that would have prompted or caused Butler's criminal conduct, relating that there were never any indications he had problems, and both parents believed their son could be rehabilitated if given the chance. ROA.6474-78, 6491-92.

Two of Butler's neighbors, his grandfather, an uncle, and a sister all remembered Butler as being kind, obedient, and trustworthy, with a good reputation in the community, and never causing trouble. ROA.6496, 6500, 6504-06, 6510-12, 6516-17, 6521-23. No one described Butler as being mentally ill, having mental health issues, or being intellectually challenged.

II. Procedural Background and Disposition of Butler's IATC Claim

In November 1988, Butler was convicted of capital murder and sentenced to death. *See Butler v. State*, 872 S.W.2d 227, 230-31 (Tex. Crim. App. 1994), *cert. denied*, 513 U.S. 1157 (1995). Butler lost his direct appeal, 872 S.W.2d at 246, and his initial state habeas petition was denied, *Ex parte Butler*, No. WR-41,121-01 (Tex. Crim. App. April 28, 1999).

Butler filed a federal habeas petition in 2002, which included the IATC claim currently before this Court. *Butler v. Cockrell*, No. 4:01-cv-00075 (S.D. Tex.) (ECF No. 55). The district court granted equitable tolling and dismissed the case without prejudice to allow Butler to exhaust a claim of intellectual

disability under *Atkins v. Virginia*, 536 U.S. 304 (2002). ROA.7246-48.

The Fifth Circuit provided the following background regarding the development of Butler's IATC claim:

> While pursuing state habeas relief, Butler's habeas counsel found letters from Butler to his trial counsel referencing "R. Palmer." [ROA.7389-90, 7392]. He also realized that Butler's statements [to Drs. Ganc and Laval] regarding his birth and his alleged time in an orphanage were inconsistent with testimony from Butler's parents at trial. [ROA.7421, 7424]. [Butler's parents] testified that Butler was born and raised in Mississippi to their family, not adopted after being sent to Illinois. [ROA.6471-72, 6487-88]. Additionally, Butler's new counsel noticed that Butler told Dr. Laval that he was sent to a mental ward at age 16 [ROA.7425], but [Butler] told Dr. Ganc that he had not had any previous psychiatric care. [ROA.7421].
>
> Butler's new counsel identified other information, apparently not known to Butler's trial counsel, that he believed proved Butler was not mentally competent at the time of trial, including: Butler's use of drugs [ROA.7405, 7440[10]]; reports from another inmate that Butler was "crazy" and talked to himself [ROA.7433-34]; reports from an attorney who represented him in a different criminal case that Butler was abusive and accused the attorney of conspiring with the government[[11]]; a prison diagnostic report stated that Butler had a "dysphoric mood" and "sad affect," which indicated he was "a depressed, somewhat paranoid individual who has a high potential for harm to self and others" and may have psychosis (or be malingering) [ROA.7440-41]; and

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[10] Butler located records from prison in which he self-reported his use of drugs. ROA.7440. However, he also told Drs. Ganc and Laval about his drug use during their pre-trial evaluations. ROA.7421-22, 7425.

[11] Butler did not provide evidence to document statements allegedly made by prior counsel apart from a motion to withdraw (which was denied). ROA.7436-38.

Butler's extreme weight loss following his arrest.[12]

Butler's new counsel contacted Drs. Ganc and Laval in 2002 to determine if their previous conclusions of competence still stood in light of the strange letters, Butler's false statements, and the other additional evidence. They had somewhat differing views from each other on the impact of this new information.

Dr. Ganc wrote that he could not modify his original opinion: "During my evaluation, according to my interpretation of my report, I did not feel there was any behavior or thinking that kept [Butler] from communication with his counselor. This conclusion is stated in my report and I will stand by it." [ROA.8473].

Dr. Laval however, was more equivocal. He noted that at the time of his evaluations, he "was not privy" to the information that Butler had accused his attorney of being a demon or that Butler had lied to Dr. Laval during the evaluation. [ROA.7430]. For Dr. Laval, "collateral information suggesting that the defendant is manifesting paranoid thoughts or delusional ideas that involve his own attorneys is of marked significance." [ROA.7430]. He expressed concerns that "at the time that [he] conducted [his] evaluation of Mr. Butler in September of 1988, there was available information regarding his state of mind which would have been not only relevant but of paramount importance in reference to the issue of competency to stand trial." [ROA.7430]. He believes that if he "reviewed and had been made aware of all that information," then it "is possible . . . [he] would have concluded that Mr. Butler was not competent and required psychiatric treatment, including the use of anti-psychotic medication, for his competency to be restored." [ROA.7430].

Butler's new counsel also contacted a third expert, psychiatrist Dr. George Woods, to re-assess Butler's history. Dr. Woods noted that Butler "suffers from a major mental illness, Bipolar Disorder" and that the Texas Department of Criminal Justice [TDCJ] "has acknowledged these symptoms and attempted

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12 Butler's evidence of weight loss comes from "notes" allegedly made by defense trial co-counsel Leonard Barksdale. ROA.26; Pet. 13. Butler did not present the notes or any evidence to support his allegation on habeas review.

> treatments of this illness since 1995." [ROA.8441-42]. His report connected the information in the bullet points above to symptoms of Bipolar Disorder. [*See generally* ROA.8442-48]. Dr. Woods concluded that Drs. Ganc and Laval "had none of the information that had to be taken into account to make an accurate assessment of whether there were any problems in Mr. Butler's relationship with his lawyers and whether those problems were due to mental illness." [ROA.8456]. Dr. Woods went a step further and concluded that "Butler likely did not have capacity to cooperate with and assist his lawyers in his defense." [ROA.8456].

Pet. App. 1 at *1-2 (citations and footnotes added).

Butler sought state habeas relief and in June 2003, filed a second state habeas application raising an *Atkins* claim, the IATC claim, and several other issues. ROA.7270-7590. The Texas Court of Criminal Appeals (TCCA) found Butler's *Atkins* claim "satisfies the requirements of Article 11.071 § 5(a), Tex. Code Crim. Proc.,"[13] but that his remaining claims did not and dismissed them as an abuse of the writ. *Ex parte Butler*, WR-41,121-02, at *2 (Tex. Crim. App. Sept. 15, 2004) [Pet. App. 5].

On September 4, 2008, the district court denied Butler's amended petition for writ of habeas corpus, granted a COA on the *Atkins* claim, and issued final judgment. ROA.918-80. The district court declined to reach the

[13] That claim was remanded to the trial court for consideration, and was denied on the merits in 2007 after a seven-day evidentiary hearing. *Ex parte Butler*, No. WR-41,121-02, 2007 WL 1847377 (Tex. Crim. App. June 27, 2007).

merits of Butler's two-part IATC claim after concluding that it was procedurally defaulted. ROA.967-74.

The Fifth Circuit granted a COA on the IATC claim and several other issues. *Butler v. Stephens*, 600 F. App'x 246 (5th Cir. April 7, 2015). In 2015, the Fifth Circuit affirmed the district court's denial of relief in part, but remanded the IATC claim for reconsideration in light of *Martinez* and *Trevino*. *Butler v. Davis*, 625 F. App'x 641, 643 (5th Cir. Sept. 9, 2015), *cert. denied*, 136 S. Ct. 1656 (2016).

On remand, on February 28, 2017, the district court concluded that Butler cannot overcome his procedural default under *Martinez*[14] and that he was not entitled to habeas relief. Pet. App. 3 at *3-5. The district court held that Butler's underlying IATC claim is "not substantial" and that state habeas counsel was not ineffective for failing to raise it. *See id.* The district court denied COA, *id*. at *5, issued final judgment, ROA.1766, and subsequently denied Butler's motion to vacate judgment and again denied COA. *Butler v. Davis*, 2018 WL 542274, at *2 (S.D. Tex. Jan. 23, 2019) [Pet. App. 4].

The Fifth Circuit denied Butler a COA after concluding that no

[14] Butler needed to show (1) that his IATC claim "is substantial," meaning it has "some merit," and (2) that state habeas counsel was ineffective in failing to present the claim in the first state habeas proceeding. *See Garza v. Stephens*, 738 F.3d 669, 676 (5th Cir. 2013) (citing *Martinez*, 566 U.S. at 14).

reasonable jurist would debate whether Butler's IATC claim is "substantial." Pet. App. 1 at *4-6. On September 12, 2018, the Fifth Circuit denied Butler's petition for rehearing. Pet. App. 2. Butler timely petitioned for certiorari review. The Director's opposition now follows.

ARGUMENT

The Rules of the Supreme Court provide that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." Sup. Ct. R. 10. Butler fails to advance a compelling reason for the Court to exercise its certiorari jurisdiction in this case and, indeed, none exists.

I. The Fifth Circuit Properly Denied a COA on Butler's Procedurally Defaulted IATC Claim Regarding Competency.

Butler argues his trial attorneys were ineffective for failing to investigate his life and mental health history to have him declared incompetent to stand trial. *See* Pet. 20. While trial counsel obtained competency evaluations by two court-appointed experts, they did not present information already-known to them bearing on Butler's mental status, and did not conduct an independent investigation into Butler's competence and provide the fruits of the investigation to the experts. *See* Pet. 20. In turn, Butler now asserts that he was prejudiced by this deficient performance because in 2002, a postconviction expert, Dr. George Woods, reviewed all the mental health

evidence and gave his opinion that Butler was not competent to stand trial. *See* Pet. 14-16, 22-24. Butler argues the Court should grant review because the Fifth Circuit misconstrued his IATC claim and then denied a COA on the reconfigured claim after finding a lack of prejudice. Pet. 20, 22-24.

This is not a cert-worthy issue. No circuit split or conflict has been supplied, no important issue proposed, nor has a similar pending case been identified to justify the Court's discretionary review. Butler's petition is nothing more than a request for error correction and this Court's limited resources would be better spent elsewhere. *See* Sup. Ct. R 10 ("A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). Considered in its entirety, the unpublished decision from the Fifth Circuit evidences a proper and straightforward application of established constitutional and statutory principles. *See generally* Pet. App. 1.

To obtain a COA, an inmate must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(1)(A); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). Because Butler's IATC claim was denied on procedural grounds, he had to show "that jurists of reason would find it debatable whether [his habeas corpus] petition states a valid claim of a denial of a constitutional right *and* that jurists of reason would find it debatable whether the district court was correct in its

procedural ruling." *Slack*, 529 U.S. at 484 (emphasis added). Additionally, the familiar standard of *Strickland v. Washington*, 466 U.S. 668 (1984), governs IATC claims. For Butler to demonstrate a substantial IATC claim to try to excuse his procedural default, he had to establish that trial counsel's actions were deficient and that such deficiency prejudiced the defense. *Id*. at 687. A failure to prove either results in denial of the claim. *Id*. at 697.

The district court concluded on remand that Butler failed to demonstrate both showings required by *Strickland* and, thus, failed to present an IATC claim regarding competency that is substantial under *Martinez*. Pet. App. 3 at *2-3; *Martinez*, 566 U.S. at 14. On appeal, the Fifth Circuit concluded that even if a COA should issue on *Strickland*'s deficient performance prong, jurists of reason would not debate whether Butler was prejudiced. Pet. App. 1 at *4. Butler fails to demonstrate that the Fifth Circuit erred in denying a COA.

To demonstrate prejudice, it must be shown "there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. "In assessing prejudice in the context of a determination regarding a defendant's competency, the question is whether there was a reasonable probability that he would have been found incompetent to stand trial." *Jermyn v. Horn*, 266 F.3d 257, 283 (3rd Cir. 2001). For Butler to establish a claim of

incompetency, he needed to produce evidence that he did not have either "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" or a "rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960); *see also* Tex. Code Crim. Proc. art. 46.06, § 1A (Vernon 1986).

In reviewing the IATC claim, the Fifth Circuit found that "Butler has not presented any competent evidence that supports his theory that the additional [mental health] evidence would have changed the experts' opinions." Pet. App. 1 at *4. In 2002, the court-appointed experts Drs. Ganc and Laval reviewed all the complained-of, omitted mental health information identified by Butler, but neither expert stated they would have changed their opinion. ROA.7429-31, 8473-74; *see* Part II of the Statement of the Case. While Dr. Laval stated that "it is possible" that he would have concluded that Butler was incompetent, ROA.7430, the Fifth Circuit determined that reasonable jurists would not debate that Dr. Laval's later equivocation about Butler's competency does not satisfy *Strickland*'s prejudice standard. Pet. App. 1 at *4. "[A]n expert opinion that is 'perfectly equivocal' cannot 'make any fact more or less probable and is irrelevant." Pet. App. 1 at *4 (citing *Pipitone v. Biometrix, Inc.*, 288 F.3d 239, 245 (5th Cir. 2002)).

Butler therefore failed to show a reasonable probability that, but for counsel's failure to better investigate his mental status and provide

information to the court-appointed experts, the experts would have come to a different conclusion and he would have been found incompetent to stand trial. Reasonable jurists would agree with the Fifth Circuit that Butler's IATC claim is not substantial and is procedurally defaulted because he fails to show *Strickland* prejudice. *See* Pet. App. 1 at *4-5.

Butler challenges the Fifth Circuit's denial of COA by initially arguing that the court misconstrued his IATC claim, analyzing it "as if it were solely a failure to present already-known information to the experts" and, in turn, erroneously "allowed the trial experts' views to control" the prejudice inquiry. *See* Pet. 20-22. He contends that *Strickland* prejudice is instead measured by examining what postconviction experts conclude after conducting a new evaluation on the basis of adequate investigation and that this Court's decision in *Rompilla v. Beard*, 545 U.S. 374, 392-93 (2005), models this method of analysis. Pet. 22-23. Butler proposes the Court grant review to "make clear to the Fifth Circuit that Butler's claim had to be reviewed as he presented it" and that "the prejudice inquiry for such a claim must focus the findings by postconviction experts[.]" Pet. 24.

A plain reading of the lower court's decision evidences it did not misconstrue or narrow Butler's claim. *See* Pet. App. 1 at *4-5. The Fifth Circuit accurately summarized Butler's claim, stating: "Butler argues that his trial counsel should have 'undertaken the investigation of Butler's mental illness'

and 'communicated the information that they would have found, together with their own experiences with Butler, to the court-appointed experts.'" Pet. App. 1 at *4. Both parts of Butler's IATC competency claim were thus considered. Additionally, in a section entitled "Background," the Fifth Circuit detailed the information known by trial counsel and the additional information discovered by Butler's state habeas counsel. Pet. App. 1 at *1-2; *see* Statement of the Case, Part II above. Butler cannot create controversy where none should exist.

Butler's argument based on *Rompilla* should be rejected. Pet. 22-23. His new theory of *Strickland* prejudice—that court's must focus on the conclusions reached by postconviction experts—was not the theory advanced below. The first time Butler cited *Rompilla* was in a footnote in his Reply Brief in the lower court. *Butler v. Davis*, No. 18-70006, Reply Brief in Support of [Butler's] Application for a [COA], filed June 4, 2018, at 9 n. 2. This Court has long held that it will neither decide issues raised for the first time on petition for certiorari nor decide federal questions not raised and decided in the court below. *See, e.g., Heath v. Alabama*, 474 U.S. 82, 87 (1985).

Regardless, the Court did not hold in *Rompilla* that a habeas court reviewing *Strickland* prejudice must focus on findings made by postconviction experts. Nor is there any established precedent cited by Butler for this proposition. To the extent Butler is asking for a new rule of law, then it is barred by the non-retroactivity principle announced in *Teague v. Lane*, 489

U.S. 288, 310 (1989). Reasonable jurists would not disagree that Butler fails to show prejudice based on such arguments.

The real crux of Butler's complaint is that the Fifth Circuit's prejudice analysis did not include the 2002 report by his postconviction expert, Dr. George Woods. Pet.23. Dr. Woods is the only expert to date who concludes that Butler was incompetent to stand trial. ROA.431-52. But his opinion was given in February 2002, thirteen years after Butler's capital murder trial concluded in November 1988. Dr. Woods' declaration is not evidence that could have been discovered by trial counsel, nor could Butler contend that his attorneys were ineffective for failing to obtain Dr. Woods' yet-to-be-offered opinion.

The Fifth Circuit did not include Dr. Woods' report in its assessment of Strickland prejudice because "as [Butler's] briefing recognizes, his theory of prejudice requires showing that the original experts would have concluded he was incompetent." Pet. App. 1 at 4, n.2. In seeking a COA, Butler argued that if trial counsel communicated with the experts, conducted an investigation, and provided the information to the experts, "one of the experts likely would have found Butler was incompetent to stand trial. This could well have led the trial court to find that Butler was incompetent." *Butler v. Davis*, No. 18-70006, Brief in Support of [Butler's] Application for a [COA], filed April 21, 2018, at 1-2. *See id.* at 22 ("Had trial counsel undertaken the investigation reasonably call for by the signs of psychosis they saw in Butler, the pretrial mental health

evaluations would have turned out quite differently."); *id*. at 41. ("there is a reasonable probability that the [court-appointed] expert opinion would have been that Butler was incompetent to stand trial."). Although Butler now wants to change the prejudice inquiry to focus on Dr. Woods' report, the Fifth Circuit correctly rejected the same based on Butler's pleadings. For the IATC claim raised below, reasonable jurists would not disagree that Butler failed to present a substantial claim under *Martinez* and it remains defaulted.

II. The Fifth Circuit Properly Denied a COA on Butler's Procedurally Defaulted IATC Claim Regarding Mitigation.

Butler argues that his trial counsel were ineffective for failing to conduct a reasonable investigation and obtain an expert opinion that Butler's "mental illness and borderline intellectual functioning" called for a negative answer to the deliberateness special sentencing issue.[15] *See generally* Pet. 17-19. His theory is that trial counsel could have explained to the jury that Butler may have turned to robbery to generate money to buy drugs that might have been taken to cope with emerging symptoms of his early stage Bipolar Disorder. Pet. 19. Seen from this perspective, his capital murder of Velma Clemons was "an attempted robbery gone bad," not a murder that was "committed deliberately

[15] The jury returned affirmative answers to three special issues regarding deliberateness, future dangerousness, and provocation, and the trial court sentenced Butler to death based on the jury's verdict. ROA.6555-60.

and with the reasonable expectation that the death of the deceased would result." Pet.19; ROA.6556. Reasonable jurists would not debate that Butler's allegations do not present a substantial IATC claim.

On remand, the district court assumed that counsel performed deficiently by failing to investigate such evidence, but rejected the IATC claim as procedurally defaulted based on Butler's failure to satisfy *Strickland*'s prejudice prong. Pet. App. 3 at *3-5. On appeal, the Fifth Circuit denied a COA after concluding that reasonable jurists would not debate whether Butler was prejudiced by the lack of evidence regarding his mental health history. Pet. App. 1 at *5-6. Butler fails to demonstrate that the Fifth Circuit erred in denying a COA.

Although Butler framed his IATC claim as a failure-to-investigate claim, "[a]t bottom, the claim is one of uncalled witnesses." *Woodfox v. Cain*, 609 F.3d 774, 808 (5th Cir. 2010). When a habeas petitioner argues trial counsel were ineffective for failing to call a witness who would have introduced mitigating evidence, he must "name the witness, demonstrate that witness was available to testify and would have done so, set out the content of the witness's proposed testimony, and show that the testimony would have been favorable to a particular defense. *Day v. Quarterman*, 566 F.3d 527, 538 (5th Cir. 2009). Butler's entire theory of mitigation comes from the 2002 report provided by Dr. George W. Woods. ROA.431-52. However, Dr. Woods never stated that he was

available and willing to testify. The Fifth Circuit properly concluded that reasonable jurists would not debate that Butler cannot establish the requisites for a successful "uncalled witness" claim. Pet. App. 1 at *5 n. 4 (citing *Woodfox*, *Day*, and *Gregory v. Thaler*, 601 F.3d 347, 351-53 (5th Cir. 2010). If Butler's expert was not available to testify, then Butler cannot show prejudice by the omission of such evidence.

Assuming Dr. Woods had been available to testify, his expert report does not assist Butler in making a substantial IATC claim. According to Dr. Woods, Butler "presently suffers from a major mental illness, Bipolar Disorder" and TDCJ has "acknowledged these symptoms and attempted treatment since 1995," seven years after trial. ROA.432-33. In his report, Dr. Woods speculates that Butler may have used illegal drugs as an "unconscious attempt" to cope with the onset of Bipolar Disorder and may have turned to robbery as an alternative means of generating enough money to buy drugs. ROA.449. He also speculates that Butler did not deliberately shoot and kill Velma Clemons, the victim of his capital murder conviction, and suggests that Butler's "paranoia likely triggered a defensive response" when Ms. Clemons "resisted Mr. Butler's attempted robbery and began to hit him." ROA.449-50. However, the Fifth Circuit determined that Dr. Woods' report was "too speculative to be any use," and his conclusions "are hedged so thoroughly that they cannot provide any reliable basis for Butler's theory." Pet. App. 1 at *5.

> The best [Dr. Woods] 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.". . . Even more problematic is the total absence of evidence from Butler himself that the purpose of the crimes was to feed a drug addiction.

Pet. App. 1 at *5. Finding Butler's mitigation theory based on conjecture, the Fifth Circuit properly concluded that "reasonable jurists would not debate that the additional evidence would not have swayed the jury." Pet. App. 1 at *5 (citation omitted).

Yet even if Butler had told Dr. Woods that his ten armed robberies were all committed so he could get money to buy drugs, there is no reasonable probability of a different outcome during the penalty phase had this information been presented. As the district court reasonably concluded:

> Although Butler's argument might, in isolation, offer some explanation for his commission of a string of robberies, it does not explain Butler's gratuitous acts of violence, including two sexual assaults, during the course of committing those robberies. Because Butler's actions went far beyond merely obtaining money to support a drug addiction, his explanations of his mental illness and alleged efforts to self-medicate do not raise a reasonable probability of a different outcome.

Pet. App. 3 at *4.

The Fifth Circuit reached a similar conclusion, holding that "Butler's theory does not even begin to explain his ruthless and depraved crimes," and reasoned that "[n]o rational jury, after hearing Butler's meticulously planned

and despicably executed crimes, would be swayed by Butler's new theory, premised on the flimsiest of conjecture." Pet. App. 1 at *5. Importantly, the Fifth Circuit found that Dr. Woods' conclusion that Butler's shooting of Velma Clemons was likely "a defensive response that did not reflect deliberation or planning" and was triggered by paranoia is "at odds with Butler's meticulously planned crimes that included specific threats to kill people if they attempted to stop him, as well as the wholly gratuitous and violent sexual assaults." Pet. App. 1 at *5. Because Butler's attempts to connect his crimes to his alleged mental illness are "so attenuated," reasonable jurists would not disagree with the Fifth Circuit's determination that Butler fails to show prejudice under *Strickland*. Pet. App. 1 at 85. (citing *Nixon v. Epps*, 405 F.3d 318, 327-28 (5th Cir. 2005) (prisoner who failed to satisfactorily connect his mental illness to the commission of his crimes failed to show prejudice)).

Butler argues that the Fifth Circuit "so distorted the material facts pertaining to prejudice" that the facts bore no relation to what were pled, and then denied the claim for lack of prejudice because of the distortion and because the Fifth Circuit analyzed prejudice under the wrong capital sentencing scheme. Pet. 24; *see generally* Pet. 24-31. He is mistaken and his arguments do not merit certiorari review.

Initially Butler takes issue with the Fifth Circuit having found Dr. Woods' report to be "too speculative to be of any use," and that Dr. Woods'

conclusions were "hedged so thoroughly that they cannot provide any reliable basis for Butler's theory." Pet.24. He insists that there is nothing "speculative" or "hedged" about Dr. Woods' conclusions regarding Butler's mental illness. *See* Pet. 25. Butler then details the information Dr. Woods relied upon in describing the course of Butler's mental illness. *See* Pet. 25-29. Butler's arguments do not call the Fifth Circuit's reasoning into doubt. As set out above, the Fifth Circuit correctly found that Dr. Woods' attempts to link Butler's mental illness to his crimes were indeed based on speculation and conjecture, and evidenced its decision by identifying several of the criticized passages. *See* Pet. App. 1 at *5.

Finally, Butler complains that the Fifth Circuit misapprehended the state law framework under which the sentencing decision was made. Pet. 29. In commenting that the "severity of the offense" and an "apparent pattern of criminal activity" in Butler's case were so egregious that "additional mitigating evidence" would be insufficient to sway the jury, the Fifth Circuit cited two cases where the inmates received a special issue regarding mitigation. Pet. App. 1 at *5 (citing *Sorto v. Davis*, 672 F. App'x 342, 351 (5th Cir. 2016), and *Guevara v. Stephens*, 577 F. App'x 364, 371 (5th Cir. 2014)). Butler contends that analyzing whether new mitigating evidence might have an effect in light of aggravating evidence has no place in this case because the jury was not

asked to consider mitigating evidence in relation to all other evidence. Pet. 30. This argument should be rejected.

The Director does not dispute that Butler's jury was not given a mitigation special issue, and instead answered the special sentencing issues on deliberateness, future dangerousness, and provocation. ROA.6555-57. The Fifth Circuit's remark was nevertheless proper. The additional mitigating evidence—namely, Dr. Woods' conjecture that Butler's shooting of Ms. Clemons was likely "a defensive response that did not reflect deliberation or planning"—was insufficient to sway the jury to give a negative answer to the deliberateness special sentencing issue because it was *at odds* with the State's aggravating evidence. As summarized in Part I. C. 1. of the Statement of the Case, the State presented overwhelming evidence of Butler's future dangerousness and deliberate conduct undertaken without provocation. In addition to the capital murder of Velma Clemons, Butler committed nine aggravated robberies during which he killed a clerk at one store, shot a clerk in the hip during another robbery, sexually assaulted two clerks at gunpoint during separate robberies, committed attempted capital murder of a peace officer, stole a car at gunpoint, and led police on a high-speed chase. Reasonable jurists would not debate that Butler fails to show *Strickland* prejudice and fails to show under *Martinez* that his procedurally defaulted IATC claim regarding mitigation is substantial.

CONCLUSION

For the foregoing reasons, the Court should deny Butler's petition for writ of certiorari.

Respectfully submitted,

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