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

No. 18-7091

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

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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THIS IS A CAPITAL CASE

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Mr. Butler complains in his Petition for Writ of Certiorari that the Fifth Circuit denied him the fundamental right to review of the actual issues he presented in his application for a certificate of appealability. He is not asking for error correction, as Respondent misleadingly argues. Rather, he is complaining that the Fifth Circuit's framing of the issues he presented so mis-stated the issues that he was effectively denied appellate review. He argues here that this breach is significant enough to warrant the Court's exercise of its supervisory power.

The two issues Mr. Butler presented to the Fifth Circuit centered on trial counsel's failure to investigate his mental health impairments. The only thing trial counsel did was to get two mental health experts appointed to examine Butler's trial competence and sanity. Counsel conducted no investigation at all of Butler's mental health history and provided no information to the appointed experts. Counsel did not even talk with the experts. In turn, the only source of information each expert had was his clinical interview with Mr. Butler. In federal habeas proceedings commencing at the end of 2000 – 14 years after the capital murder and 12 years after Butler's capital trial – for the first time lawyers representing Mr. Butler conducted an investigation of his mental health history and engaged a psychiatrist, Dr. George Woods, to evaluate his competence to stand trial and to determine if Mr. Butler had any mental health impairments that reasonably could have led to a different outcome (a) of the trial competence question, and (b) of sentencing phase of the trial. Based on the facts developed during this investigation, Dr. Woods determined that Mr. Butler suffered the early stages of a serious psychotic illness, Bipolar Disorder, at the time of the capital crime and the other crimes he committed and during the course of the ensuing capital trial proceeding. Dr. Woods concluded

that this illness made Butler incompetent to stand trial and, directly relevant to the pre-*Penry*[1] special issues, caused him to act out of psychotically-driven emotion, rather than deliberation, when he shot the capital murder victim.

1. Ineffective assistance in investigating competence to stand trial

On the ineffectiveness issue concerning competence, Butler presented Dr. Woods' findings and opinions to the two appointed experts who interviewed Mr. Butler prior to trial and asked whether, if they had the information that was available to Dr. Woods, they might have reached a different conclusion as to trial competence. One, Dr. Laval, said "it is possible" he would have found Butler incompetent, the other said he would not have.

In reviewing this claim, the Fifth Circuit assumed deficient performance on the part of trial counsel. *Butler v. Davis*, Appendix 1 to Petition for Writ of Certiorari [hereafter, Pet. App. 1], at *4. The long-established framework utilized for analyzing prejudice with respect to failure-to-investigate-mental-illness claims is that the determination made by the post-conviction mental health expert on the basis of the new facts developed in post-conviction is examined to determine whether there is a reasonable probability that such an expert determination would have changed the outcome of the proceeding. *See, e.g., Rompilla v. Beard* , 545 U.S. 374, 392-93 (2005) (employing this framework of analysis). That same framework has been utilized for many years by the Fifth Circuit. *See, e.g., Loyd v. Whitley*, 977 F.2d 149, 160 (5th Cir. 1992) (basing the prejudice analysis on the testimony of post-conviction experts).

In the Fifth Circuit, Mr. Butler relied on this framework, along with the doubt about competency expressed by Dr. Laval upon review of the fruits of the federal habeas investigation

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

of this matter, to establish prejudice. This is how Butler argued prejudice in his COA Application/Brief:

> That Dr. Laval cannot go further than this, and conclude with a reasonable degree of psychological certainty that Butler was seriously mentally ill and incompetent to stand trial, is of no moment in gauging the prejudice to Butler of his attorneys' deficient performance. *Strickland v. Washington* does not require a habeas petitioner to show that his attorney's deficient performance 'more likely than not' affected the outcome of the trial. 466 U.S. at 693. *Strickland* requires the showing of only 'a *reasonable* probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' *Id*. at 694 (emphasis supplied). And, '[a] reasonable probability' is simply 'a probability sufficient to undermine confidence in the outcome.' *Id*. Dr. Laval's assessment of the previously-unknown information, coupled with Dr. George Woods' similar independent assessment of this evidence, shows – sufficiently to satisfy the *Strickland* standard – that Mr. Butler may very well have been incompetent to stand 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 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. Barksdale recalled that Butler 'did not appear very interested in what was going on.' ROA.1694. 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. This Court cannot have confidence in the outcome of the competency proceedings in the face of this evidence.

Butler v. Davis, No. 18-70006, Brief in Support of [Butler's] Application for a [COA], at 39-40.

The problem with the Fifth Circuit's framework of analysis is that it *excluded* the new

facts developed in federal habeas, including Dr. Woods' opinion based on those facts, from its analysis of prejudice. Respondent concedes this: "The Fifth Circuit did not include Dr. Woods' report in its assessment of *Strickland* prejudice...." Respondent's Brief in Opposition [hereafter, BIO], at 24. Having excluded that evidence, the Fifth Circuit held that there was no showing of prejudice, because "Dr. Laval's later equivocation about Butler's competency does not satisfy the prejudice standard." Pet. App. 1, at *4. Of course Dr. Laval's equivocation, standing alone, might not satisfy the *Strickland* prejudice standard. However, as the excerpt from the Butler's COA brief, *supra*, demonstrates unequivocally, Butler did not rely on Dr. Laval's equivocation alone. He also, critically, relied on Dr. Woods' federal habeas-based findings and opinion.

Respondent argues that the fault for the Fifth Circuit's erroneous framing of the prejudice question was Butler's own briefing. BIO, at 24-25. However, that argument is plainly not true – as the excerpt from Butler's COA brief, *supra*, makes crystal clear. Thus, when the Fifth Circuit noted, "[Butler's] theory of prejudice requires showing that the original experts would have concluded he was incompetent," Pet. App. 1, at *4 n.2, the Fifth Circuit mis-read Butler's briefing. Again, the actual briefing by Butler to the Fifth Circuit, *supra*, shows this quite plainly. Butler's briefing argues that "Dr. Laval's assessment of the previously-unknown information, *coupled with* Dr. George Woods' similar independent assessment of this evidence, shows – sufficiently to satisfy the *Strickland* standard – that Mr. Butler may very well have been incompetent to stand trial." COA Brief, at 39-40 (emphasis supplied).

For these reasons, the Fifth Circuit's framing of the prejudice question on the first ineffectiveness claim was so off-base it effectively denied appellate review to Mr. Butler.

2. <u>Ineffective assistance in investigating mental-health-based mitigation</u>

On the ineffectiveness issue concerning penalty phase mitigation, the Fifth Circuit again

focused entirely on the showing of prejudice, determining that the evidence proffered in federal habeas proceedings through Dr. Woods was "too speculative to be of any use," Pet. App. 1, at *5, and that this evidence "does not even begin to explain his ruthless and depraved crimes." *Id.* In the Petition for Writ of Certiorari, Mr. Butler explained why these determinations by the Fifth Circuit were based on a fundamental mis-reading of the facts found by and opinion offered by Dr. Woods, and mis-use of the post-*Penry* Texas death penalty statutory scheme as the legal framework against which to analyze prejudice even though Mr. Butler was tried under the pre-*Penry* statutory scheme.

Respondent argues, in keeping with the Fifth Circuit, that Dr. Woods' findings and opinions were too speculative to carry any weight. BIO, at 27-28. However, Respondent relies on her own characterizations rather than Dr. Woods' actual words. Thus, she says that "Dr. Woods speculates" and "suggests" various important matters, BIO, at 27, when in fact Dr. Woods said the following in setting forth his conclusions:

- "[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 (emphasis supplied).
- "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." ROA.1683 (emphasis supplied).
- Mr. Butler's ingestion of methamphetamines "*had* the tragic effect of exacerbating rather than ameliorating his emerging Bipolar Disorder." ROA.1690 (emphasis supplied).
- While "[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, "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*.

- And, as to the capital crime itself, "[w]hen 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." ROA.1691 (emphasis supplied).

These critical aspects of Dr. Woods' opinion cannot be fairly characterized as "hedged" or "speculative,"as the Fifth Circuit characterized them and as the Respondent disingenuously echoes. They reflect a careful analysis by an expert who acknowledges that a fuller history would have been better but still finds the history sufficient to develop clinical impressions that would have satisfied the preponderance standard had Texas required it for mitigating evidence.[2] Moreover, his conclusions clearly could have satisfied the "reasonable probability" standard of *Strickland* that is employed in the prejudice inquiry.

With respect to the Fifth Circuit's use of the wrong Texas legal framework against with to measure prejudice, Respondent indirectly concedes that the court used the wrong framework. *See* BIO, at 31 ("[t]he 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"). However, Respondent argues that this does not matter because the prosecution's "overwhelming evidence of Butler's future dangerousness and deliberate conduct undertaken without provocation," *id*., would have outweighed Dr. Woods'

[2]There was no standard when Mr. Butler was tried since mitigation was not part of the pre-*Penry* statute.

opinion that the shooting of Ms. Clemons was not deliberate. This is simply not true, as we demonstrated in the Fifth Circuit. COA Brief, at 45-47. Respondent focuses here, as the district court did, on the other violent crimes committed by Mr. Butler, apart from the capital murder and the crimes associated with his apprehension: the murder of a different store clerk in a different robbery, a non-fatal shooting of a third clerk in another robbery, and the sexual assault of two female clerks in two other robberies. The district court's statement that the evidence of mitigation newly developed in federal habeas proceedings "does not explain" these acts of violence is simply not accurate. It does.

The other fatal shooting, of store clerk Jeff Johnson, was almost identical to the shooting of Ms. Clemons. When Butler "asked for the money," "[t]he clerk then put both hands on the counter and just looked at [Butler]." *Ex parte Butler*, 416 S.W.3d 863, 864-67 n.3 Tex.Crim.App. 2012).[3] Butler then repeated his demand, the clerk did nothing, and Butler shot him in the stomach. *Id*. Thus, the passive resistance of the victim of this crime to Butler's demands indicated that this shooting had the same "robbery gone bad" character – driven by mental illness not malice, ROA.1690-91 – as the shooting of Ms. Clemons. As Dr. Woods explained, "That he only shot Ms. Clemons 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.

The non-fatal shooting of store clerk Madonna Benoit was the result of a racist provocation by Benoit, which produced a mental illness-driven over-reaction in Butler. When the person who robbed Benoit was walking out of the store, Benoit testified that she called a

[3]As we noted in the Petition for Writ of Certiorari, these pages of the Court of Criminal Appeals' opinion are not paginated separately.

friend and said that "a fucking nigger" had just robbed her. ROA.6243-44. She testified that at that point, "[The robber] turned around. He said, 'What did you say, white bitch,' and he pulled the trigger and he shot me," ROA.6244, in the left hip. ROA.6247. Given Benoit's racially incendiary provocation, it is easy to understand how this shooting pushed the mentally ill Butler to shoot Benoit, if he indeed was the shooter.[4] As with the fatal shootings, this shooting occurred under circumstances in which "Butler's paranoia likely triggered a defensive response that did not reflect deliberation and planning." ROA.1691 (Dr. Woods). In addition, according to DSM-5,[5] "often the predominant mood" in Bipolar Disorder "is irritable, rather than elevated, particularly when the individual's wishes are denied or if the individual has been using substances." *Id*. at 127. Butler's disproportionate response to a racial slur – like the capital murder of Ms. Clemons and the killing of Mr. Johnson – was likely associated with his mental illness compounded by ongoing substance abuse.

Finally, the two sexual assaults that Butler committed during the course of two of the robberies were also likely associated with his mental illness. DSM-5 notes that one of the diagnostic criteria for Bipolar Disorder is "[e]xcessive involvement in activities that have a high potential for painful consequences (e.g., ... sexual indiscretions...)." *Id*. at 124. This feature is further described: "Sexual behavior may include infidelity or indiscriminate sexual encounters with strangers, often disregarding ... interpersonal consequences." Never before the onset of Bipolar Disorder had anyone ever suggested that Butler engaged in sexually inappropriate, much less assaultive, behavior. The sexual assaults may well have been associated with the

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[4]As set forth in the amended federal habeas petition, despite Butler's confession to this crime, there is significant evidence that he did not commit the crime. ROA.267-70

[5]American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 5th Edition (2013).

inappropriate, emotionally-drive sexual behavior, indifferent to the interpersonal consequences, associated with his mental illness.

As the Court explained in *Sears v. Upton*, 561 U.S. 945, 951 (2010), in finding that *Strickland*'s test of prejudice had been met in similar circumstances,

> [W]ith this new mitigation evidence...[,] [c]ompetent counsel should have been able to turn some of the adverse evidence into a positive.... This evidence might not have made Sears any more likable to the jury, but it might well have helped the jury understand Sears, and his horrendous acts – especially in light of his purportedly stable upbringing.

The evidence of Butler's mental illness would have had the same effect before his jury. Contrary to the district court's and the Fifth Circuit's determinations, the un-investigated mitigating evidence clearly *would* have "explain[ed] Butler's gratuitous acts of violence." ROA.1763 (district court opinion).

At bottom, the assessment of prejudice rests on an assessment of the effect of the evidence that was not presented on the evidentiary picture that was before the jury. As the Court explained in *Strickland v. Washington*, 466 U.S. 668, 695-96 (1984),

> In making this [prejudice] determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect....

Butler's case is not a case in which the new evidence "would barely have altered the sentencing profile presented to the sentencing [jury]." *Id.* at 700. The jury had nothing before it to suggest that the capital murder and the other crimes were anything but deliberate. The evidence that could have been presented showed that this appearance may not have been accurate. The Fifth Circuit's analysis of prejudice under the wrong Texas capital sentencing statute had the effect of

denying appellate review on this issue.

Conclusion

By the time the Fifth Circuit reviewed Mr. Butler's most recent application for a certificate of appealability, it had already reviewed Mr. Butler's case twice before. *See* Petition for Writ of Certiorari, at 5 (Procedural History). It appears that on its third occasion to review Mr. Butler's case – the present proceedings – the court delegated its work to someone who conducted a slap-dash review unworthy of the court's duties in the federal judicial system. The difference between the first and second times the court reviewed Mr. Butler's case and this most recent time could not be starker. Mr. Butler could not fairly complain to this Court if the Fifth Circuit had reviewed the actual issues he presented, framing the issues in a manner faithful to the way he raised them. The court did not do that here.

For these reasons, Mr. Butler urges the Court to exercise its supervisory power to recall the Fifth Circuit to its responsibility to review accurately the actual claims and arguments presented in an application for a certificate of appealability.

Respectfully submitted,

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