No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RAY MACARTHUR FREENEY, *Petitioner*

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, *Respondent,*

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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THIS IS A CAPITAL CASE

QUESTION PRESENTED

1) Whether deference is accorded to a state court decision under 28 U.S.C. §2254(d) where the state court received and relied upon material evidence and submissions from the State while unreasonably denying the petitioner notice and an opportunity to be heard?

LIST OF PARTIES

The parties to the proceeding in the Fifth Circuit Court of Appeals were:

- Ray Macarthur Freeney, Petitioner-Appellant
- Lorie Davis, Director, Texas Department Of Criminal Justice, Correctional Institutions Division, Respondent-Appellee

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PETITION FOR WRIT OF CERTIORARI

Petitioner Ray Freeney respectfully requests that the Court grant a writ of certiorari to review the decision of the Fifth Circuit Court of Appeals denying his application for Certificate of Appealability in his 28 U.S.C. 2254 habeas proceedings.

The petitioner is the petitioner and petitioner-appellant in the courts below. The respondent is the United States of America, the respondent and respondent-appellee in the courts below.

OPINIONS BELOW

The substituted order of the Fifth Circuit Court of Appeals denying Mr. Freeney's application for certificate of appealability is at *Freeney v. Davis*, 737 F. App'x 198 (5th Cir. 2018), and is reprinted in the Appendix. App. A.

The order of the United States District Court for the Southern District of Texas granting summary judgment, denying Mr. Freeney's petition for writ of habeas corpus and denying a COA is at *Freeney v. Stephens*, 2016 U.S. Dist. LEXIS 9319 (S.D. Tex. Jan. 27, 2016) and is reprinted in the Appendix. App. B.

JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Fifth Circuit Court of Appeals on the basis of 28 U.S.C. § 1254. The Court of Appeals denied Petitioner's application for certificate of appealability on August 13, 2018. On November 1, 2018, this Court granted Mr. Freeney's application

and extended the date for filing this petition to January 10, 2019. *Freeney v. Davis*, 18A464. This petition follows timely pursuant to Supreme Court Rule 13.1.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The question presented implicates the following provision of the United States Code:

28 U.S.C. § 2254(d)

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

A. Summary of the case presented

This case presents a question as to which there is a solid circuit split that should be resolved by this Court and deals with aspects of the operation of the Antiterrorism and Effective Death penalty Act (AEDPA) that have concerned this Court and its members for some time.

In his state habeas proceedings, when adjudicating Mr. Freeney's federal constitutional claim of ineffective assistance of counsel, the state court received and relied upon evidence and submissions from the State without providing Mr. Freeney with notice or an opportunity to be heard.

More specifically, following a remand from the Texas Court of Criminal Appeals (CCA) for factual development of parts of the ineffective assistance claim, the district court set a schedule under which affidavits of material witnesses were to be filed, including affidavits from trial counsel. The parties were to have twenty-one days to file their submissions following the filing of the affidavits of trial counsel.

Instead of honoring this schedule, eight days after one of the two trial counsel submitted his affidavit, and one day after the State had submitted proposed findings of fact and conclusions of law, the state court adopted the State's proposed findings verbatim and transmitted those findings to the CCA. The proposed findings relied heavily upon the affidavit of trial counsel in recommending that Mr. Freeney be denied relief. The CCA adopted the trial court's findings and denied relief.

Misled by the state court as to when he would be allowed to make his submissions, Mr. Freeney had no notice or opportunity be heard. He was denied his

opportunity to rebut or otherwise respond to trial counsel's affidavit – an affidavit that, as counsel pointed out to the circuit court, contained numerous critical inaccuracies that then infected the state court's judgment. Mr. Freeney was also denied his opportunity to make submissions or respond to the State's proposed findings; findings the court then adopted verbatim by signing an order to that effect prepared and provided by the State.

In federal habeas proceedings Mr. Freneey argued that the deferential standard contained in 28 U. S. C. §2254(d) did not apply because Mr. Freeney's federal constitutional claim was not adjudicated on the merits. Further, that even if §2254(d) did apply, the State's denial of the most basic elements of due process represented an antecedent unreasonable application of federal law meeting the exception in §2254(d)(1).

The district court and the Fifth Circuit Court of Appeal were in agreement in holding that §2254(d) deference applies to decisions of state courts no matter what process they use to reach their decisions and that the basic elements of due process need only be afforded if the defendant is claiming incompetence to be executed or intellectual disability.

Thus the question is squarely presented whether §2254(d) deference applies where a state court receives and relies upon material evidence and submissions while unreasonably denying the petitioner notice and an opportunity to be heard.

The following statement of the case is intended to provide sufficient detail of the proceedings below to assist the Court in determining that this important question is properly before the court in this case.

B. At trial level, defense counsel relied upon a defective investigation to decide to present a mitigation theory that was factually false

Mr. Freeney was indicted in respect of two gruesome and disturbing murders. The precise circumstances of the murders principally emerged from Mr. Freeney's own descriptions of events in his confessional statements to law enforcement and are described in the circuit court opinion. *Freeney v. Davis*, 737 F. App'x 198, 200 (5th Cir. 2018); App. A.

The mitigation investigation at trial was largely circumscribed by those witnesses identified and made available by Mr. Freeney's mother. The mitigation case presented a narrative in which Mr. Freeney had lived a fairly normal childhood, with a loving mother and no significant history of misconduct. As the defense presentation went, Mr. Freeney experienced a psychotic break while serving in the National Guard and since that time had been diagnosed with schizophrenia or schizoaffective disorder and a change in his behavior was observed by those around him. The offense followed.

There was limited testimony alluding to the possibility of childhood abuse. Leon Bey testified that he knew Mr. Freeney after the incident in the National Guard and that on one occasion Mr. Freeney asked to move in with Mr. Bey and "[h]e went on to say he had been abused as a child and some other things in his life but like I said its been awhile." 22 R.R. 127; Doc 13-49 at 127. This was the entirety of his

testimony regarding abuse Mr. Freeney suffered as a child. Dr. Milam, a psychologist called by the defense, testified that therapy notes contained in hospital records (arising after the psychotic break in the National Guard) indicated that Mr. Freeney self-reported being sexually abused by his uncle in childhood but that there was no independent corroboration. The records also showed that Mr. Freeney self-reported sexually abusing his brother. Dr. Milam testified that she did not know whether to believe Mr. Freeney's self-report or not. 22 R.R. 281-2; Doc 13-49 at 282-3.

A notable shortcoming of the narrative presented was that it failed to draw any link between Mr. Freeney's mental illness and the offending behavior. This was a major flaw that the state capitalized on in penalty phase closing to great effect. 22 R.R. 155-163; Doc 13-50 at 157-65.

In essence, the narrative was that Mr. Freeney was a good guy, who developed schizophrenia and then committed two horrible rape/murders that were out of character, though without any particular link to between the offending and the schizophrenic illness.

Mr. Freeney was convicted at trial and sentenced to death.

C. In state post-conviction, Mr. Freeney alleged that his counsel had conducted an inadequate investigation and failed to present evidence that his offending was directly related to his severe mental illness whose development stretched back into a childhood marked by extreme physical, sexual and emotional abuse

Mr. Freeney's application for writ of habeas corpus in state court included an ineffective assistance of trial counsel claim, alleging that trial counsel had failed to

adequately investigate and develop mitigating evidence. SHCR at 2-76.[1] Mr. Freeney specifically alleged that trial counsel had failed to contact or interview seven highly relevant witnesses: Mr. Freeney's two brothers, his aunt, his step-father, his step-father's wife, the mother of his child and a close family friend.

Mr. Freeney further alleged that if interviewed, these witnesses would have presented a substantially different portrait of Mr. Freeney's life, providing detailed evidence of a chaotic childhood marked by sexual, physical and emotional abuse, including abuse and neglect at the hands of Mr. Freeney's mother. The witnesses would also have disclosed that Mr. Freeney exhibited signs of disturbed behavior and the development of his severe mental illness from a young age, far earlier than the acute psychotic episode in the National Guard. The witnesses would also have disclosed an escalation in sexually aggressive behavior when off medication following the psychotic episode in the National Guard. In essence, the new evidence showed that the factual predicate for the defense narrative at trial was not simply a poor choice but was not true.

Critically, in addition to affidavits from the witnesses, Mr. Freeney attached affidavits from mental health experts Dr. Reynolds and Dr. Milan, attesting to the importance of the new information. SHCR 65-66, 230-233 and SHCR 64, 225-228.

[1] Consistent with the opinion of the circuit court, citations to the state court record of the habeas proceedings will be cited as SHCR and citations to the supplemental record created following remand will be cited as Supp. SHCR. The circuit court advises that the state court record was received in hard copy rather than as part of the electronic ROA. The SHCR and Supp. SHCR may be found in Doc 13-56 in the record of the district court.

Dr. Reynolds had been a consulting mental health expert for the defense team at trial and Dr. Milam a testifying mental health expert.

The affidavits demonstrated that the new evidence would have been "critically important"[2] and provided a powerful link between: Mr. Freeney's history as a victim of abuse; his disturbed childhood behavior; his severe mental illness; and, Mr. Freeney's sexualized, violent behavior in the commission of the offences.[3]

Confirming that she had not been provided the newly available information regarding Mr. Freeney's dysfunctional childhood, Dr. Milan explained that these facts "were critically important in understanding the progression of his mental illness. Mr. Freeneys mental illness was both shaped and defined by his childhood." SHCR at 225.

Explaining that many schizophrenics are not violent but that some are, Dr. Milan stated that the "deciding factor, that may have lead to an aggressive and assaultive expression of a mental illness is an interaction of functional abnormalities [the mental illness] and a violent and deprived childhood. Knowledge of his childhood experiences was a critical factor in understanding Mr. Freeneys behavior." SHCR at 225.

As Dr. Milam put it, "[w]hen his schizophrenia is placed in the context of his environment; the sexual abuse by his uncle and the sexual promiscuity of his mother,

[2] Affidavit of Dr. Milam, SHCR at 225.

[3] The new material would also likely have led to a formal diagnosis of post-traumatic stress disorder "if follow-up evaluation and interviews with Freeney substantiated this now strong suspicion." Affidavit of Dr. Reynolds, SHCR at 232.

sexual acting out became a behavioral expression of the mental illness that was evolving within his brain." This concept was echoed by Dr. Reynolds who stated, "This same violence was a bedrock of Mr. Freeneys experience. Mr. Freeneys mental illness was channeled through that bedrock."[4] SHCR at 232-3.

Dr. Milam summed up the significance of the new evidence as follows:

> It is my opinion that without knowledge of Ray's childhood which was marked by physical, sexual and emotional abuse, neglect and inadequate supervision along with clear indications of early onset of mental illness the jury would not be able to make a fair and balanced assessment of his personal moral culpability.

SHCR 228.

The application requested that an evidentiary hearing be held on the *Strickland* claim. SHCR at 25.

The State filed its answer,[5] arguing that Mr. Freeney "fails to show deficient performance, much less harm, based on counsel not presenting the above-cited harmful, cumulative, contradictory, or benign punishment testimony." SHCR at 115.

On April 17, 2012, the convicting court signed an order submitted by the State, finding one controverted, material fact issue, but not specifying what the fact issue was that the court intended to resolve. SHCR 214-215. The order further directed Freeney's trial counsel, Robert Loper and Layton Duer, to file affidavits within 60 days which "should discuss . . . anything they deem relevant to Applicant's allegations

[4] This is a far cry from defense counsel's concession in penalty phase closing that, "You don't have to find that his mental illness caused these things. In fact they didn't. There's no question about it." 23 R.R. 149; Doc 13-50 at 151.

[5] ROA 79-115

of ineffectiveness" and which should "discuss, at the very least, their efforts to discover mitigation evidence, and their strategy, if any, as it relates to the punishment case presented on Applicant's behalf." *Id.* Finally, the order mandated the filing of proposed findings by the parties within thirty days after trial counsel filed their affidavits. *Id.*

The two trial counsel submitted affidavits, whose contents were described by the circuit court as follows:

> Duer's affidavit stated that he and Loper undertook a "thorough pre-trial investigation" that included hiring an investigator, a mitigation specialist, and mental health experts, and that also included interviews with family members "with regard to possible history of mental illness, abuse as a child, and possible history of violence." Loper's affidavit was similar to Duer's and noted that both trial counsel and the mitigation specialist asked the witnesses whom they interviewed about any additional witnesses who might be available to testify. However, Loper added that **the newly provided affidavits from family members raised issues that he "would have certainly wanted to know about." He stated that if the new affidavits are accurate, "it [then] appears that [Freeney's] mother was not forthcoming and actually was untruthful" about certain aspects of Freeney's upbringing.**

Freeney, 737 F. App'x at 202 (emphasis added).

Pursuant to the court's order, Mr. Freeney thereafter filed proposed findings of fact and conclusions of law on November 19, 2012. SHCR at 249–58. The State filed proposed findings on November 28, 2012. SHCR at 260–300. The court adopted the State's proposed findings verbatim on December 5, 2012, SHCR at 298–99, and the case was transferred to the Texas Court of Criminal Appeals (CCA) for disposition.

D. The Texas Court of Criminal Appeals remanded the case for further factual development regarding counsel's performance but upon remand the district

court received and relied upon evidence and submissions from the state while unreasonably denying Mr. Freeney an opportunity to be heard

On March 20, 2013, the CCA remanded the application back to the convicting court after finding that the record was inadequate to resolve the *Strickland* claim. Supp. SHCR at 2–6; *Ex parte Freeney*, slip op., No. WR-78,109-01 (Tex. Crim. App. Mar. 20, 2013). The court held that it was

> not able to determine from this record: "(1) whether applicant's family members and friends who now have provided affidavits were available and willing to testify at the time of trial; (2) whether anyone from the defense team attempted to contact any of the witnesses; (3) the nature and extent of any efforts to contact them; (4) if no one from the defense team contacted them, the reasons why they were not contacted; and (5) if anyone contacted them, the results of that contact.

Supp. SHCR at 5.

On May 3, 2013, Mr. Freeney filed an ex parte motion for investigative assistance. Supp. SHCR. at 16–18. Freeney argued that the CCA order called for obtaining information from witnesses other than trial counsel, and that "obtaining information solely from trial counsel without giving habeas counsel the opportunity to rebut any contrary testimony violates due process." Supp. SHCR at 17

On July 12, 2013, the trial court signed an order presented by the State directing Mr. Freeney's counsel to provide trial counsel Freeney's trial file. Supp. SHCR at 23–25. The order further directed trial counsel, Mr. Loper and Mr. Duer, to prepare affidavits addressing the questions of the CCA within twenty-one days after receiving the files. *Id.* The order also directed the parties to file proposed findings of fact and conclusions of law within 21 days following receipt of the affidavits. *Id.*

On July 31, 2013, the trial court summarily denied Mr. Freeney's request for investigative assistance. Supp. SHCR at 34.

On September 19, 2013, the trial court issued a further order directing that affidavits be prepared and filed from Mr. Loper and Mr. Duer, Gina Vitale [mitigation specialist], J.J. Gradoni [fact investigator] and "any other witness from the defense trial team" to address: (1) the nature and extent of the defense team's efforts to contact the named witnesses; (2) how the witnesses were contacted; (3) why the witnesses were not contacted, if any; and (4) the results of contact with each witness, if any. Supp. SHCR at 29-31. The new order also directed that affidavits be prepared and filed from the seven defense witnesses relied upon by Mr. Freeney addressing (1) whether the witness was available and willing to testify at the trial; and (2) whether any member of the defense team attempted to contact the witness before trial. *Id.*

On September 20, 2013, the State filed an advisory indicating that the trial file had been provided to trial counsel on September 13, 2013 and that, pursuant to the trial court's scheduling order of July 12, 2013, trial counsel's affidavits were due October 4, 2013, and proposed findings were due October 25, 2013. Supp. SHCR at 27–28.

On October 7, 2013, Freeney's counsel filed a second *ex parte* motion for investigative assistance to locate and contact witnesses who were the subject of the court's September 19, 2013, order. Supp. SHCR at 36–41. The motion related that with the state's assistance, counsel had been able to make contact with some of the witnesses but had been unable to make contact with four others. Although no order

in the record reflects the motion to have been denied, a subsequent pleading asserts that the court denied "both" of Freeney's counsel's requests for investigative assistance. Supp. SHCR at 46.

On December 2, 2013, Freeney filed affidavits from four of the civilian witnesses and noted that a fifth had already stated in his original affidavit that he was not interviewed or contacted by defense counsel. Supp. SHCR at 46–68. Defense counsel, who was located in New Mexico, advised that he had not been able to contact the other two witnesses without investigative assistance, which he had been denied. SHCR at 46.

On the same date, one of the two trial counsel, Robert Loper, swore his second affidavit. Supp. SHCR at 70–96. The affidavit became part of the record, but it does not reflect ever having been formally filed and was never formally served on Freeney's counsel by the district clerk. The Director below produced an email reflecting that the State emailed the affidavit to state habeas counsel on December 4, 2013 after Mr. Loper had faxed it to counsel for the State. ROA 225.

It appears that on December 9, 2013, counsel for the state provided the court with its proposed findings of fact and conclusions of law.[6] Included as pages thirteen and fourteen was an order for the judge's signature, adopting the State's proposed findings and ordering that they be transmitted to the CCA.

[6] The record does not reflect that the State ever formally filed its proposed findings of fact and conclusions of law, as no file stamp appears on the document in the clerk's record. In the court below, the Director produced an email reflecting that it emailed the document to a Joseph DeBruyn, the court coordinator, with carbon copy to Freeney's state habeas counsel on December 9, 2013. ROA 234.

The very next day, December 10, 2013, the state trial court signed the order, adopting verbatim the State's supplemental proposed findings of fact and conclusions of law. Supp. SHCR at 109–10; App. D. The findings adopted by the trial court relied extensively on Robert Loper's second affidavit to resolve controverted fact issues. See Supp. SHCR. at 98–107.

No affidavit was ever filed from trial counsel, Mr. Duer, despite the orders of July 12 and September 19, 2013 requiring such an affidavit. No affidavits were filed from Ms. Vitale or Mr. Gradoni, as required by the order of September 19, 2013.

By the terms of the July 12 order, the parties were to file proposed findings of fact and conclusions of law "within twenty-one days following receipt of the affidavits from Applicants former trial attorneys." Supp. SHCR 24.

Notwithstanding this grant of twenty-one days to respond once the "affidavits" (plural) of "Applicant's trial attorneys" (plural) were received, the state court ruled against Mr. Freeney without warning, a mere eight days after the affidavit of one of the trial lawyers was received, depriving Mr. Freeney of notice and an opportunity to be heard.

On January 29, 2014, the CCA adopted the trial court's supplemental findings and denied relief. *Ex parte Freeney*, slip op., No. WR-78,109-01 (Tex. Crim. App. Jan. 29, 2014); App. C.

E. In federal habeas proceedings, the district court granted summary judgment after ruling that the state court's decision was to be afforded full deference under

28 U.S.C. §2254, despite the state court's denial of notice and an opportunity to be heard

State habeas counsel was appointed as federal habeas counsel and filed a petition for writ of habeas corpus, once again alleging the ineffective assistance claim. ROA 26. The petition argued that no deference was due under 28 U.S.C. §2254(d) as Mr. Freeney had been denied due process and, as a result of the state court's conduct of the proceedings, the claim had not been adjudicated on the merits within the meaning of AEDPA. ROA 42-53. The habeas petition specifically alleged:

> not only did the state court rely on an incomplete record in its adjudication of the Petitioner's claims, but it also denied the Petitioner the opportunity to (a) challenge the contents of the Loper affidavit, and (b) provide his own proposed findings of fact, which denied the Petitioner his fundamental right to due process.

ROA 50. The petition emphasized that is was of "particular significance" that "counsel for the Petitioner was not given the opportunity to challenge the affidavit of Robert Loper." ROA 51. In urging that the state court's was not an adjudication on the merits, Mr. Freeney pointed to both the materially incomplete record before the state court and, more importantly, that "the court did not permit Petitioner any opportunity to respond to the evidence the court relied upon." *Id.*

Mr. Freeney also argued that even if §2254(d) did apply, the denial of due process in the state court proceedings constituted an antecedent unreasonable application of federal law such that the exception in §2254(d)(1) was met. ROA 53-54.[7]

[7] Mr. Freeney also argued that other aspects of the state court's decision met the "contrary to or unreasonable application" exception to §2254(d)(1) but consistent with circuit authority, the district

The district court ordered respondent to file an answer. ROA 82.

Instead of filing an answer, Respondent moved for summary judgment. ROA 89. Respondent's argument for summary judgment was that §2254(d) applied and, as no exceptions to those provisions were met, the court's determination was bound by the state record and no further evidentiary development could be conducted.[8] Thus, the case was ripe for summary judgment applying the statutory standard and because Mr. Freeney had failed to prove objective unreasonableness of the state court's determination, relief should be denied.[9] Respondent did not argue that even if §2254(d) did not apply that summary judgment should be granted on de novo review.

In support of summary judgment, Respondent argued that all that is required for adjudication on the merits is the presentation of a claim and a denial. ROA 129-130. Respondent argued, §2254(d) applies with full force and, citing *Valdez v. Cockrell*, 274 F.3d 941 (5th Cir. 2001), argued that full deference under §2254(d) applies regardless of the fact-finding process in state court. ROA 129-131. Respondent further argued that there was no violation of due process because an entitlement to procedural due process is "unique" to *Ford*[10] incompetence claims or claims of intellectual disability. ROA 131-133.

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court assessed only the objective reasonableness of the state court's decision to deny relief, rather than the reasonableness *vel non* of its reasoning.

[8] See, in particular, ROA 97, 98, 124, 126, 128, 129.

[9] See, in particular, ROA 175-6, 186.

[10] *Ford v. Wainwright*, 477 U.S. 399 (1986).

Mr. Freeney filed an opposition to the request for summary judgment, reiterating his arguments that §2254(d) did not apply and that therefore, the State's motion for summary judgment was without merit. ROA , 292-3, 305. Mr. Freeney requested that summary judgment be denied and that the court "set this matter for an evidentiary hearing and provide Petitioner's counsel the resources deprived him in state court so he can fully develop the Petitioner's ineffective assistance of counsel claim." ROA 305. Mr. Freeney did not purport to address the question of whether the summary judgment standard was met if §2254(d) were found not to apply and review was to be conducted *de novo*.

The district court granted summary judgment, holding that the state court's determination constituted an adjudication on the merits because "section 2254(d)(1) places no qualifier on its application to any claim 'adjudicated on the merits.' The statute contains no requirement that the state adjudication proceed under any certain set of circumstances." ROA 359-360; App. B. The district court also denied Mr. Freeney's claim of an antecedent denial of Due Process, holding that a state habeas petitioner was only entitled to "core procedural due process guarantees" if alleging incompetence to be executed or intellectual disability. ROA 360; App. B.. The district court described these as a "unique exception" to the general rule that deference will applied no matter how the state court adjudication proceeded. ROA 360 at n.4; App. B.

Applying §2254(d), the district court held that Mr. Freeney had failed to show "that the state court's denial of his *Strickland* claim was not contrary to, or an unreasonable application of, federal law. 28 U.S.C. § 2254(d)(1)." ROA 366.

In a footnote, the district court observed in a single sentence that "this Court's discussion of *Strickland* prejudice would not change under a de novo review." ROA 360. However, this brief observation should not be understand as a grant of summary judgment on a basis never brought by the Director and as to which Mr. Freeney had been given no notice and no opportunity to respond.[11]

The district court *sua sponte* denied a certificate of appealability. ROA 369-370.

F. The circuit court denied a certificate of appealability, holding that §2254(d) deference applies no matter how egregious the process in state court and that there is no clearly established requirement for a state court to afford due process in habeas proceedings, save for competency to be executed and intellectual disability claims

Mr. Freeney requested a certificate of appealability in the circuit court and was permitted to file a supplement to that application after a change of counsel.

In his application for certificate of appealability to the circuit court, Mr. Freeney once again disputed the application of §2254(d) deference in his case, specifically arguing that the state court's decision did not constitute an adjudication on the merits and that, in any event, the violation of due process in the state court proceedings represented an antecedent violation of clearly established federal law,

[11] *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986).

satisfying the exception to §2254(d)(1). *Request for COA* at 28-38; *Supplemental Application for COA* at 7-21.

In arguing that the state court's decision should not be regarded as an adjudication on the merits, Mr. Freeney drew the court's attention to this Court's definition of the phrase in *Williams*, 133 S. Ct. at 1097 and argued that as the state court on remand did not hear and evaluate the evidence and the parties' substantive arguments its decision cannot meet the definition of "adjudicated on the merits" adopted by in *Williams*.

Supplemental Application for COA at 9. Mr. Freeney further argued that Respondent's reliance on *Valdez* (*supra*) was misplaced as the rationale in that case – that defects in state process could be cured by an evidentiary hearing in federal court prior to the application of §2254(d) – had been wholly rejected by this Court in *Pinholster*.

Mr. Freeney also drew the Court's attention to *Winston v. Kelly*, 592 F.3d 535, 555–56 (4th Cir. 2010) (*Winston I*) (judgment on a materially incomplete record is not an adjudication on the merits); *Winston v. Pearson*, 683 F.3d 489, 500 (4th Cir. 2012) (*Winston II*) (prior ruling unaffected by *Pinholster*). See also *Wilson v. Workman*, 577 F.3d 1284, 1292 (10th Cir. 2009) (no adjudication on the merits where failed to consider petitioner's evidence) and concluded that it was at least arguable, at COA stage, that the state court decision did not adjudicate the claim on the merits.

In arguing that the violation of due process in the state court proceedings represented an antecedent violation of clearly established federal law, Mr. Freeney

pointed to this Court's jurisprudence holding that state post-conviction proceedings must not "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental, or transgress[] any recognized principle of fundamental fairness in operation." *DA's Office v. Osborne*, 557 U.S. 52, 69 (2009).

Mr. Freeney highlighted the line of this Court's jurisdiction, dating back to the adoption of the Fourteenth Amendment, holding that notice and an opportunity to be heard are an essential requisite of due process of law and a prerequisite to a judicial determination of rights. *See Supplemental Application for COA* at 12-16; *Windsor v. McVeigh*, 93 U.S. 274, 277–78 (1876); *Richards v. Jefferson County*, 517 U.S. 793, 797 (1996). Mr. Freeney also argued that traditional principles of preclusion apply and that, properly interpreted, §2254 can be made consistent with this Court's jurisprudence regarding preclusion. *Request for COA* at 30-38.

The circuit court denied a certificate of appealability, holding that no reasonable jurist could debate the claim that there had been no adjudication on the merits:

> because "[t]he term 'adjudication on the merits' . . . refers solely to whether the state court reached a conclusion as to the substantive matter of a claim, as opposed to disposing of the matter for procedural reasons. It does not speak to the quality of the process."

Freeney, 737 Fed. Appx. at 204-205 citing *Valdez*, 274 F.3d at 950. The circuit court dismissed Mr. Freeney's citation of *Johnson v. Williams* and its definition of "adjudication on the merits" as limited to its facts, holding that "no reasonable jurist could read *Johnson* as undermining our binding precedent." *Id.* at 205. Finally, the circuit court held that as Mr. Freeney had been granted an opportunity to present his

claim prior to the remand by the CCA, he could not argue that his claim was not adjudicated on the merits. *Id.*

The circuit court further held that there was no "clearly established due process law" nor any other precedent suggesting the state court was in error in deciding to sign the state's proposed findings before twenty-one days elapsed from the filing of Mr. Loper's affidavit and before Mr. Freeney had responded. *Id.* at 205-6. The court held that no reasonable jurist could debate the state court's decision to proceed in this manner. *Id.*

The circuit court then addressed the exceptions to §2254(d)(1) argued by Mr. Freeney, that is, those parts of the state court judgment that Mr. Freeney claimed were contrary to or an unreasonable application of clearly established federal law.

As to the deficiency prong, the circuit court found that no reasonable jurist could debate the propriety of the state court's application of *Strickland*. *Id.* at 207. As to the prejudice prong, the circuit court found that no reasonable jurist could debate that it was appropriate for the state court to take into account the double-sided nature of the new mitigation evidence, nor the propriety of considering the admissibility and credibility of the evidence. *Id.* at 208.

The circuit court concluded that "[j]urists of reason could not debate whether the state habeas court acted contrary to or unreasonably applied *Strickland*." *Freeney*, 737 F. App'x at 209. The circuit court then similarly concluded that Mr. Freeney's claim under §2254(d)(2) was unavailing. *Id.* at 209-10.

The circuit court did not purport to consider whether a COA should issue on the alternative ground that relief would be denied even without §2254(d) deference and no such holding was necessary, given the denial of a COA in light of the application of §2254(d).

When initially denying Mr. Freeney's request for a COA the panel held that review under §2254(d) was limited to "only the ultimate legal determination by the state court—not every link in its reasoning." *Freeney v Davis*, 724 Fed. Appx. 303, 312 (5 Cir. 2018). Mr. Freeney sought *en banc* review, arguing that this Court's decisions, including *Panetti v. Quarterman*, 551 U.S. 930 (2007) and *Wilson v. Sellers*, 138 S.Ct. 1188 (2018), made clear that a federal habeas court should review the reasoning of the state court to determine whether the decision involved an unreasonable application of clearly established federal law. The panel withdrew its opinion and reissued a new opinion that appears to be identical to the original opinion save for the two sentences and associated footnotes containing the error alleged. *Freeney v. Davis*, 737 Fed. Appx. 198, 199-200 (5 Cir. Aug 13, 2018). Review *en banc* of the substituted opinion was then denied. *Id.*

Mr. Freeney now petitions this Court.

REASONS FOR GRANTING THE PETITION

I. This Court should decide whether deference is accorded to a state court decision under 28 U.S.C. §2254(d) where the state court received and relied upon material evidence and submissions from the State while unreasonably denying the petitioner notice and an opportunity to be heard

A. The Fifth Circuit has resolved, by denial of certificate of appealability, an important federal question which should be resolved by this Court and has done

so by adopting a rule that so far departs from the accepted and usual course of judicial proceedings as to require this Court's intervention

State courts, equally with federal courts, have an obligation "to guard, enforce, and protect every right granted or secured by the Constitution of the United States . . . as the supreme law of the land." *Robb v. Connolly*, 111 U.S. 624, 637 (1884).

Looking at AEDPA as a whole, it displays "Congress' intent to channel prisoners' claims first to state court." *Pinholster*, 563 U.S. at 182. Section 2254(d) "carries out 'AEDPA's goal of promoting comity, finality, and federalism by giving state courts the first opportunity to review [a] claim, and to correct any constitutional violation in the first instance.'" *Pinholster*, 563 U.S. at 185 quoting from *Jimenez v. Quarterman*, 555 U.S. 113, 121 (2009).

"Provisions like §§ 2254(d)(1) and (e)(2) ensure that '[f]ederal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings.'" *Pinholster*, 563 U.S. at 186.

Thus, "[i]f a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court." *Pinholster*, 563 U.S. at 185.

However, AEDPA was not designed to foreclose federal review and § 2254(d) "reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems.'" *Harrington v. Richter*, 562 U.S. 86, 102 (2011) quoting from *Jackson v. Virginia*, 443 U.S. 307, 332, n. 5 (1979) (Stevens, J., concurring in judgment).

In the present case, the Fifth Circuit has held that by operation of §2254(d), the federal court is precluded from granting relief no matter how egregious the process employed by the state court in adjudicating federal constitutional rights and that state court adjudications of federal rights are incontestable even where the adjudications occur in the context of violations of the most fundamental guarantees of due process.

The Fifth Circuit's rule transforms §2254(d) from "a guard against extreme malfunctions in the state criminal justice systems" into a shield to preserve from review the most extreme malfunctions of the state criminal justice system and to deny state prisoners the protection of the supreme law of the land.

B. This Court should grant certiorari to resolve a circuit split on the question of whether deference is due a state court decision where the state court unreasonably fails to consider material evidence

There is now a clear circuit split between the rule in the Fifth Circuit and the holdings in the Fourth, Tenth and Second Circuits, with the Sixth and First Circuits hewing more closely to the position of the Fifth Circuit.

1. The Fourth Circuit holds that a federal claim has not been "adjudicated on the merits" when the state court makes its decision on a materially incomplete record

The Fourth Circuit holds that a federal claim has not been "adjudicated on the merits" when the state court makes its decision on a materially incomplete record, such as when a state court unreasonably refuses to permit further development of the facts of a claim. *Gordon v. Braxton*, 780 F.3d 196, 202 (4th Cir. 2015); *Winston v. Pearson*, 683 F.3d 489, 496 (4th Cir. 2012) ("*Winston II*"); *Winston v. Kelly*, 592 F.3d

535, 555 (4th Cir. 2010) ("*Winston I*"). As a result, no deference is due to such a decision under §2254(d). *Id.*

In *Winston I*, the Fourth Circuit held that "judgment on a materially incomplete record is not an adjudication on the merits for purposes of § 2254(d)." *Winston I*, 592 F.3d at 555. The court reasoned that "[t]he requirement that § 2254(d) be applied only to claims 'adjudicated on the merits' exists because comity, finality, and federalism counsel deference to the judgments of state courts when they are made on a complete record." However, similarly to when a state chooses not to adjudicate a claim presented to it, "when a state court forecloses further development of the factual record, it passes up the opportunity that exhaustion ensures." *Id.* The court pointed out that its holding was consistent with holdings in the Tenth Circuit and Second Circuit, citing to *Wilson v. Workman*, 577 F.3d 1284 (10th Cir. 2009) and *Drake v. Portuondo*, 321 F.3d 338 (2d Cir. 2003).

In *Winston II*, the Commonwealth challenged the holding in *Winston I* regarding deference, in light of the intervening decisions in *Cullen v. Pinholster*, 563 U.S. 170 (2011) and *Harrington v. Richter*, 562 U.S. 86 (2011). The Fourth Circuit closely scrutinized the decisions and determined that "nothing in those decisions that renders infirm our analytical framework in *Winston I*. Neither decision clarifies the 'adjudicated on the merits' requirement of § 2254(d)(1) such that it compels disturbing our prior holding that the state-court denial of Winston's habeas petition was not an adjudication on the merits." *Winston* II, 683 F.3d at 500.

In *Gordon* the court applied the principles developed in *Winston I* and *Winston II* and, by doing so, made clear that the opinion in *Winston II* was not based on an application of the "law of the case" doctrine but represents the law of the circuit. *Gordon*, 780 F.3d at 202.

2. The Tenth Circuit holds that when the state court has not considered the material evidence that a defendant submitted to support the substance of his arguments, it has not adjudicated that claim on the merits

In an *en* banc opinion, the Tenth Circuit holds that "when the state court has not considered the material evidence that a defendant submitted to support the substance of his arguments, it has not adjudicated that claim on the merits" for the purposes of §2254(d). *Wilson*, 577 F.3d at 1291.[12] In reaching this conclusion, the majority relied, on the same definition of "on the merits" contained in Black's Law Dictionary that this Court relied upon in *Williams* (*supra*). That is a judgment "delivered after the court has heard and evaluated the evidence and the parties' substantive arguments." Black's Law Dictionary 1199 (9th ed. 2009).

A dissent authored by then Judge Gorsuch noted that the majority opinion "cements a circuit split" on the treatment of material evidence not considered in the state court proceeding and further that this Court had recently granted a petition for certiorari to resolve the question but then denied certiorari as improvidently granted. *Id.* at 1317, n.10; *Bell v. Kelly*, 553 U.S. 1031 (2008) *cert denied at* 555 U.S. 55 (2008).

[12] The Oklahoma rule that the Tenth Circuit was addressing in *Wilson* no longer applies as understood at the time of *Wilson* but this does not alter the court's interpretation of §2254(d).

3. The Second Circuit has held that where a state court does not permit factual development and relies upon an incomplete record, its conclusions are not entitled to deference under §2254(d)

In *Drake v. Portuondo*, 321 F.3d 338, 345 (2d Cir. 2003) (*Drake I*), the petitioner sought relief arising from perjury by an expert witness called by the prosecution but his motion in state court was denied without a hearing. *Id.* at 343. The Second Circuit held that §2254(d) deference did not apply "because the state courts did not permit the development of the factual record, and because the Appellate Division relied on that incomplete record, there is at present no way for a federal habeas court to assess whether the Appellate Division's conclusion represented an unreasonable application of federal law." *Id.* at 345. When the case reappeared before the Second Circuit six years later, the court reaffirmed its holding. *Drake v. Portuondo*, 553 F.3d 230, 239 (2d Cir. 2009) (*Drake II*) ("In this case, we have already held that no deference to the state courts' conclusions is required because the state courts did not permit the development of the factual record.")

The Second Circuit does not appear to have addressed *Drake I* since *Pinholster* and *Richter* were announced but its holding has been applied at district court level. See *Graves v. Smith*, 2012 U.S. Dist. LEXIS 41354, at *15 (E.D.N.Y. Mar. 23, 2012)

4. The Sixth Circuit had held prior to *Pinholster* that there is no adjudication on the merits where substantial evidence supporting a habeas claim was not before the state court

Prior to *Pinholster*, the Sixth Circuit had adopted a rule similar to the Fourth and Tenth Circuits, holding that a state court decision does not represent an "adjudication on the merits" of a *Brady* claim where, through no fault of the

petitioner, substantial evidence supporting a habeas claim was not before the state court. *Brown v. Smith*, 551 F.3d 424, 428-9 (2008).

Subsequent to this Court's decision in *Richter* (*supra*), another panel of the Sixth Circuit has held that "to the extent that *Brown* is inconsistent with *Harrington's* definition of 'on the merits,' however, it is no longer the law." *Ballinger v. Prelesnik*, 709 F.3d 558, 562 (6th Cir. 2013). The court considered the reasoning of the Fourth Circuit in *Winston II* but held that in light of *Pinholster* and *Richter*, a federal court could not allow a petitioner to supplement a sparse trial court record even where petitioner diligently sought to do so in state court. *Id.*

It remains unclear exactly how the Sixth Circuit would treat a case such as the present, but the Sixth Circuit is certainly in direct conflict with the Fourth Circuit on the effect of *Pinholster* on the scope of the phrase "adjudicated on the merits".

5. The First Circuit has largely rejected the logic of *Winston* and *Wilson* as to "adjudication on the merits" but left open the possibility that a denial of due process in state court may strip a decision of §2254 deference

In *Atkins v. Clarke*, 642 F.3d 47 (1st Cir. 2011) the petitioner argued that a claim is not adjudicated on the merits unless the state court has granted a full and fair evidentiary hearing. *Id.* at 49. The First Circuit rejected this proposition and rejected petitioner's reliance on *Winston II* and *Wilson*, holding that to the extent the cases were inconsistent with *Pinholster*, they were overruled and that petitioner's case was not like either of those cases.[13] *Id.*

[13] The Fourth Circuit in *Winston II* rejected the argument that in *Atkins v Clarke* the First Circuit held that *Winston I* was overruled by *Pinholster*.

In *Garuti v. Roden*, 733 F.3d 18, 22-24 (1st Cir. 2013) the petitioner argued that without a state court evidentiary hearing to resolve disputed questions of fact there was no adjudication on the merits. *Id.* at 22-23. Considering itself bound by *Pinholster* and the prior circuit decision in *Atkins* (*supra*), the court rejected the argument. *Id.* The petitioner also argued that the state court had deprived him of due process, thus stripping the state ruling of §2254 deference. Id. at 23-24. The court acknowledged that the First Circuit had not yet addressed this question but determined that it "need not resolve the issue here because the factual circumstances that could trigger an exception to *Pinholster's* bar on evidentiary hearings do not exist in this case." *Id.* at 24.

6. Addressing the problem of whether to grant deference in the face of egregious errors in state court process, the Ninth Circuit has taken a slightly different approach by finding the exception contained in §2254(d)(2) to be met in such circumstances

Approaching the problem from another angle, the Ninth Circuit holds that if the fact-finding process employed by the state court is defective, then a petitioner will have satisfied the exception contained in §2254(d)(2), triggering de novo review. In describing the type of defect, the Ninth Circuit held that it must be such that it would be unreasonable to hold that the process was adequate:

> before we can determine that the state-court fact-finding process is defective in some material way, or perhaps non-existent, we must more than merely doubt whether the process operated properly. Rather, we must be satisfied that any appellate court to whom the defect is pointed out would be unreasonable in holding that the state court's fact-finding process was adequate.

Taylor v. Maddox, 366 F.3d 992, 1000 (9th Cir. 2004). The court relied in part on Judge Dennis' dissent in *Valdez*, 274 F.3d at 961-68. Of course, the Fifth Circuit in

the present case relied upon the majority opinion in *Valdez* to hold that defects in the state court process are irrelevant. The Ninth Circuit has continued to apply this rule in the wake of *Pinholster*. See *Hurles v. Ryan*, 752 F.3d 768, 790-91 (9th Cir. 2014).

The Tenth Circuit and Fourth Circuit have adopted the Ninth Circuit's test in Taylor. *Smith v. Aldridge*, 904 F.3d 874, 882-83 (10th Cir. 2018); *Moore v. Hardee*, 723 F.3d 488, 499 (4th Cir. 2013).

C. The question presented has been recognized by this Court as a serious question worthy of this Court's consideration but has not yet been squarely presented in an appropriate case

This Court has previously grappled with but not squarely answered the question of whether and to what extent a state court denial of a federal constitutional claim bars relief under §2254(d) where the state court unreasonably denied the petitioner an opportunity to be heard.

As noted above, this Court has previously granted certiorari to consider a similar question to that presented here. The question presented in *Bell v. Kelly*, 553 U.S. 1031 (2008) *cert denied at* 555 U.S. 55 (2008) was predicated on a state court *refusal* to consider evidence of prejudice on an IAC claim. At oral argument, counsel for Kelly conceded that the state court had not *refused* to consider evidence proffered to it but argued that the state court had refused to grant sufficient time, discovery or an evidentiary hearing to allow the petitioner to fully develop the evidence in support of his claim. This Court denied certiorari as improvidently granted.

The issues captured within the question presented also featured in discussion among the justices of this Court, but were not resolved by the opinion of this Court, in *Pinholster*.

In *Pinholster*, the Court was clear that §2254(d) applies only where "a claim has been adjudicated on the merits by a state court" and explained that "[p]rovisions like §§ 2254(d)(1) and (e)(2) ensure that '[f]ederal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings.'" *Pinholster*, 563 U.S. at 185.

However, as observed in *Winston II*, the opinion in *Pinholster* did not seek to define the scope of when a claim could be said to be "adjudicated on the merits" in state court. Nor did the opinion address the denial of basic due process in the state court proceeding.

The underlying concern about foreclosing the ability to enforce federal constitutional rights, no matter how egregious the state proceeding, found expression in Justice Sottomayor's dissent: "I assume that the majority does not intend to suggest that review is limited to the state-court record when a petitioner's inability to develop the facts supporting his claim was the fault of the state court itself." *Pinholster*, 563 U.S. at 213 n.5 (Sottomayor J. dissenting).

Importantly, both Justices Alito and Breyer in their concurrences made the point that AEDPA is not designed to deprive a petitioner of a remedy for a violation of his federal constitutional rights but to give the state courts the first opportunity to consider those matters and reserve federal habeas for those cases in which state

courts acted unreasonably. *Pinholster*, 563 U.S. at 204 (Alito J., concurring); *Pinholster*, 563 U.S. at 206 (Breyer J., concurring)

D. Mr. Freeney's case is a good vehicle for this Court to consider the question presented

Mr. Freeney's case is a good vehicle for this court to consider the question presented.

The issue of the application of §2254(d) has been the central issue throughout the federal proceedings. Respondent applied for and was granted summary judgment on the basis that §2254(d) applied. If §2254(d) does not apply at all or an exception to §2254(d) is satisifed, the federal district court would address Mr. Freeney's federal constitutional claim *de novo*. At that point, Respondent could file an answer, issue could be joined, any necessary fact development conducted (within the continuing limitations of the other provisions of AEDPA) and Mr. Freeney's federal constitutional claim could be adjudicated on the merits in a proceeding whose fairness and accuracy is protected by core due process protections.

The circuit court has squarely grappled with the issue presented and held that full deference under §2254(d) applies no matter how incomplete the record before the state court, no matter the "springes"[14] placed before the petitioner in presenting his federal claim in state court, and no matter the deprivation of the most basic elements of due process in state court. In doing so, the Fifth Circuit has further cemented a

[14] *Davis v. Wechsler*, 263 U.S. 22, 24 (1923).

circuit split on the application of §2254(d) where state court's unreasonably prevent the proper presentation of a federal claim.

The conduct of the state court in denying Mr. Freeney an opportunity to be heard in his capital case is egregious. By denying Mr. Freeney an opportunity to be heard, as opposed to limiting the manner in which he could be heard, the error complained of speaks to an extreme malfunction in state court proceedings of a particular kind, rather than of a particular degree. A holding of this Court on the question presented will provide an important and easily applied rule that can operate uniformly across the country.

Finally, it is important to reiterate that this is a capital case and that Mr. Freeney stands to be executed on the strength of the adjudication of his federal constitutional claim in the state proceeding. The proceedings below and in state court do not represent the "especially vigilant concern for procedural fairness and for the accuracy of factfinding" nor "the greater degree of scrutiny of the capital sentencing determination" required in death cases. *Monge v. California*, 524 U.S. 721, 732 (1998); *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985).

CONCLUSION

It is respectfully submitted that this Court should grant certiorari to consider whether deference is to be accorded to a state court decision under 28 U.S.C. §2254(d) where the state court received and acted upon evidence and submissions on an *ex parte* basis.

Respectfully submitted,

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Dated: January 10, 2019