NO. 18A521 (CAPITAL CASE)

IN THE
SUPREME COURT OF THE UNITED STATES

TEDDRICK BATISTE,
Petitioner,

v.

LORIE DAVIS, Director,
Texas Department of Criminal Justice (Institutional Division),
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

KENNETH W. MCGUIRE*
McGuire Law Firm
P.O. Box 79535
Houston, Texas 77279
(713) 223-1558
kennethmcguire@att.net
**Counsel of Record*

KATE SAUER PUMAREJO
P.O. Box 204472
Austin, TX 78720
(917) 597-2876
katespumarejo@gmail.com

Attorneys for Petitioner

QUESTIONS PRESENTED

The post-conviction state court process in Batiste's case was inadequate for ascertaining the truth and lacked critical components of an adjudication on the merits. Batiste's fact-intensive, extra-record ineffective assistance claim—based on trial counsels' failure to discover and present evidence of his organic brain damage—raised disputes of material fact that were improperly resolved without affording Batiste a meaningful opportunity to be heard, despite his repeated requests to depose trial counsel and/or hold an evidentiary hearing. Instead, the convicting court ceded its judicial decision-making power to the State, allowing an assistant district attorney ("ADA") to make every credibility determination, resolve every contested material fact, and decide every legal issue by adopting that ADA's proposed findings of fact and conclusions of law verbatim—without so much as removing the words "State's Proposed" from the title. State-authored factual findings and legal conclusions were subsequently held to preclude habeas relief by the federal district court, whose decision the Fifth Circuit refused to hear an appeal from. Three courts have now failed to fulfill their core responsibility to conduct an independent and meaningful review of Batiste's constitutional claims and preserve the appearance of impartiality, which is particularly important in the case of an individual sentenced to death by jurors who never knew he suffers frontal lobe brain damage or learned what bearing that brain damage might have on the criminal acts he was found guilty of committing.

This case therefore presents the following questions:

1. Whether, in the course of denying an appeal, the Fifth Circuit misapplied the procedural bar contained in 28 U.S.C. § 2254(d) by failing to scrutinize the state court's decision for whether its reasoning was contrary to, or involved an unreasonable application of, federal law; or was based on an unreasonable determination of the facts.

2. Whether the Fifth Circuit should have concluded that the intervening decision in *Wilson v. Sellers*, 138 S. Ct. 1188 (2018), meant reasonable jurists could disagree about the district court's pre-*Wilson* application of 28 U.S.C. § 2254(d), wherein the district court did not scrutinize the state court's reasoning in the reasoned decision below.

PARTIES TO THE PROCEEDINGS BELOW

This petition stems from a habeas corpus proceeding in which petitioner Teddrick Batiste was the Petitioner before the United States District Court for the Southern District of Texas, as well as the Applicant and the Appellant before the United States Court of Appeals for the Fifth Circuit. Batiste is a prisoner sentenced to death and in the custody of Lorie Davis, the Director of the Texas Department of Criminal Justice, Institutional Division ("Director"). The Director was the Respondent before the United States District Court for the Southern District of Texas, as well as the Respondent and the Appellee before the United States Court of Appeals for the Fifth Circuit.

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

Constitution and Statutes

Miscellaneous Authorities

PETITION FOR A WRIT OF CERTIORARI

Teddrick Batiste respectfully request a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The unpublished Opinion and Order of the United States Court of Appeals for the Fifth Circuit denying a certificate of appealability is at Tab 1 of the attached appendix. The unpublished Order of the Fifth Circuit denying the petitions for rehearing is at Tab 2. The unreported Memorandum Opinion of the United States District Court for the Southern District of Texas denying habeas relief is at Tab 3. The unpublished Order of the Texas Court of Criminal Appeals denying state post-conviction relief is at Tab 4. The state trial court's recommended Findings of Fact and Conclusions of Law is attached at Tab 5.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. §§ 2241 and 2254. The Fifth Circuit had appellate jurisdiction under 28 U.S.C. §§ 1291 and 2253. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment VI provides: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defence."

U.S. Constitution, Amendment VIII provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

U.S. Constitution, Amendment XIV provides: "No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2253(c) provides: "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right."

28 U.S.C. § 2254(d) provides:

> 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

Teddrick Batiste is confined under a sentence of death pursuant to the judgment of the 174th District Court, Harris County, Texas, case number 1212366, which was rendered and entered on June 23, 2011. ROA.5866-67.[1]

During the guilt phase of Batiste's trial, the State presented evidence that he and an unknown accomplice killed Horace Holiday at a gas station during the course of a robbery. *See* ROA.11827-12608 *passim*. Defense counsel did not call any witnesses during the guilt phase.

At the punishment phase, the State called psychologist Scott Kreiger, who had evaluated Batiste as a juvenile and offered a diagnostic impression of conduct disorder. ROA.2719, 2724. Kreiger testified that the non-neurological testing he

[1] The federal record on appeal, filed in the United States District Court for the Southern District of Texas on May 12, 2015, is cited to as "ROA.[page]."

performed indicated that young Batiste was "impulsive and preferred action over thought and reaction." ROA.2730-31.

The defense presented testimony from only one expert witness, a professor of criminal justice, who spoke generally about the security and classification system of Texas prisons. ROA.3622-72. Through testimony from several lay witnesses and Batiste himself, defense counsel presented evidence showing that Batiste was a hard worker, a good father, and an individual who was remorseful for the pain and suffering he caused his victims and their families. Defense counsel also asked Batiste's mother about his early hospitalization for what Batiste's mother called "meningitis on his brain" and introduced hospital records showing that Batiste had been hospitalized for ten days in the Memorial Hermann Hospital Pediatric Intensive Care Unit with bacterial meningitis when he was nine months old. ROA.7843,46.

Post-conviction investigation performed by the Office of Capital and Forensic Writs ("OCFW") revealed that Batiste suffers from organic brain damage. Based on the records of Batiste's hospitalization for meningitis, a medical expert was retained to perform neuropsychological testing that revealed that Batiste suffers from frontal lobe damage to his brain and his ability to perceive and conceptualize risk is significantly compromised. ROA.7863. The OCFW filed an Initial Application for a Writ of Habeas Corpus on May 1, 2013, alleging *inter alia* that trial counsel was deficient in failing to conduct a reasonable investigation of Batiste's background and

mental health and that Batiste was prejudiced because jurors never learned that he suffered from organic brain damage.[2] ROA.5967.

On November 13, 2013, in response to the State's Motion Designating Issues and for Trial Counsel Affidavits, Batiste argued that "the submission of affidavits by trial counsel should be but one step, and not the end, of the Court's fact-gathering process" and asked for depositions and/or a live hearing in addition. After court-ordered affidavits from trial counsel addressing the effectiveness of their assistance were submitted, Batiste again argued the need for further fact finding through either depositions or a live hearing, in his Response to Trial Counsel Affidavits. ROA.7091. All requests for additional fact development were denied, and the parties were ordered to file Proposed Findings of Fact and Conclusions of Law. Both sides submitted Proposed Findings of Fact and Conclusions of Law on December 15, 2014.[3] Argument on both parties' proposed findings and conclusions was heard on December 22, 2014.

On January 21, 2015 the trial court adopted the State's Proposed Findings of Fact and Conclusions of Law verbatim, declining to find trial counsel ineffective. App. Tab 5. Batiste subsequently filed a Request for Remand in the Texas Court of Criminal Appeals ("CCA"), directing the court's attention to controverted issues related to his frontal lobe damage that required resolution, and asking that his

---

[2] The Application included an affidavit from the neuropsychologist whose testing revealed the damage to Batiste's frontal lobe, *see* App. Tab 7, as well as a request for an evidentiary hearing in the prayer for relief.

[3] The State filed a sixty-one-page document in which there were 172 paragraphs detailing specific factual allegations and 39 paragraphs containing legal opinions; Batiste's post-conviction counsel filed an eighty-five-page document containing 246 findings of fact and 249 conclusions of law.

Application be sent back to state court with instructions to proceed according to Section 98 of Article 11.071.[4] On April 29, 2015, the CCA summarily adopted the trial court's findings and conclusions and denied state habeas relief in a two-page order. *Ex parte Batiste*, No. WR-81,570-01, 2015 WL 1954456 (Tex. Crim. App. Apr. 29, 2015) (not designated for publication), App. Tab 4.

Undersigned counsel of record was appointed to represent Batiste in the United States District Court for the Southern District of Texas, Houston Division on May 21, 2015. ROA.17. On September 19, 2017, the district court denied Batiste's petition for a writ of habeas corpus, wherein Batiste had argued, *inter alia,* that trial counsel was ineffective for not discovering his frontal lobe damage and for subsequently failing to present expert testimony regarding his brain dysfunction. App. Tab 3.[5] The district court did not issue a Certificate of Appealability ("COA").

---

[4] From the Request for Remand:

> The convicting court's treatment of Claim One—that is, Batiste's trial counsel were ineffective for failing to present evidence that their client has damage to his frontal lobe which affects impulsivity and risk-taking behavior—illustrates the inadequacy of its fact finding. A threshold question to this claim is whether Batiste actually has an impaired frontal lobe. On one side of the argument is an accredited neuropsychologist, Dr. James Underhill, who administered to Batiste a comprehensive neuropsychological evaluation. In addition, Dr. Underhill interviewed Batiste regarding his family background; personal history and experiences; and current physical, medical, and emotional state . . . Dr. Underhill concluded that 'Mr. Batiste suffers from damage to his frontal lobe, specifically with regard to the part of the prefrontal cortex that controls risk taking.'
>
> In its Answer, the State proffered no evidence to rebut Dr. Underhill's conclusion. It hired no expert of its own, nor did it challenge Dr. Underhill's credentials. Instead, the State argued against Dr. Underhill's conclusion on three specious grounds, all of which have become part of the official record in this case by the convicting court's credulous acceptance of the State's proposed findings." (Internal citations omitted)

[5] Batiste also filed a Reply to Respondent Davis' Motion for Summary Judgment on August 15, 2018, to which he attached a second affidavit from Dr. Underhill responding to the state court's

Batiste filed an Application for a Certificate of Appealability in the United States Court of Appeals for the Fifth Circuit on March 5, 2018, arguing that reasonable jurists could debate both the district court's analysis of ineffective assistance of counsel and whether one of the statutory exceptions to § 2254(d) was present. *Wilson v. Sellers*, 138 S. Ct. 1188 (2018), was decided on April 17, 2018. On May 8, 2018, in his Reply to the Director's Response in Opposition to a Certificate of Appealability, Batiste argued that COA should be granted in light of *Wilson*'s holding. The Fifth Circuit issued its opinion denying COA on July 6, 2018 and an Order Denying Petition for Rehearing and Petition for Rehearing En Banc on August 24, 2018. App. Tabs 1, 2. Justice Alito granted an Application for a 50-Day Extension of Time to File a Petition for Writ of Certiorari on November 20, 2018 that extended Batiste's filing date to January 11, 2019.

REASONS FOR GRANTING RELIEF

I. The Fifth Circuit Misapplied 28 U.S.C. § 2254(d) by Failing to Scrutinize the State Court's Decision for Whether its Reasoning was Contrary to, or Involved an Unreasonable Application of, Federal Law; or was Based on an Unreasonable Determination of the Facts

The Fifth Circuit Court of Appeals denied Batiste a Certificate of Appealability, holding—as the district court did—that "reasonable jurists could not debate whether the state habeas court was unreasonable in finding that trial counsel lacked reason to investigate further and develop that Batiste's cognitive deficit may have been caused by frontal lobe damage due to meningitis in infancy." App. Tab 1 at

findings and conclusions, *see* App. Tab 8, and requested a federal evidentiary hearing to develop disputed material facts. ROA.7749.

10. The Fifth Circuit cited as a reason the fact that three mental health experts did not identify brain damage as a "necessary neuropsychological mitigation inquiry." *Id.* It also cited as a reason the conclusion that post-conviction expert Dr. James Underhill's affidavit attached to the application was "vague and inconsistent in its suggestion that Batiste's risky behavior traced to the meningitis he was treated for." *Id*.

The Fifth Circuit wrote that it "agreed" with the district court's conclusion that the state court did not unreasonably resolve the *Strickland* claim, but that was an outcome-oriented approach that is not consistent either with the text of 28 U.S.C. § 2254(d) or *Wilson v. Sellers*, 138 S. Ct. 1188 (2018), which requires a court to scrutinize a state court's reasoning in deciding whether it was contrary to, or involved an unreasonable application of, federal law.[6] No ruling has yet been made on this question, either in the district court or the appellate court.[7] The bar to habeas relief contained in § 2254(d) simply may not be applied unless and until the court has determined that *neither* of its statutory exceptions are present.

---

[6] The Fifth Circuit also failed to ascertain whether reasonable jurists could debate that the state court's decision was based on an unreasonable determination of facts, which is a separate exception to the habeas relief bar contained in § 2254(d).

[7] Given that the state court's Findings of Fact and Conclusions of Law were written by the Harris County District Attorney's Office and adopted verbatim by the court (ROA.7263), the "judicial" determinations in question are actually the original work of an assistant district attorney and necessitate scrutiny by a judge—i.e., an adjudication in the literal sense of the word—which so far has not occurred at *any* stage of the proceedings in Batiste's case. (The wholesale judicial adoption of State-authored Findings of Fact and Conclusions of Law in Harris County is not unique to Batiste: *see* Jordan M. Steiker *et. al*., *The Problem of "Rubber-Stamping" in State Capital Habeas Proceedings: A Harris County Case Study*, 55 HOUS. L. REV. 889, 889-931 (2018).)

A. 28 U.S.C. § 2254(d)

By enacting 28 U.S.C. § 2254(d), the Antiterrorism and Effective Death Penalty Act (AEDPA) "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials'[.]" *Bell v. Cone*, 535 U.S. 685, 693 (2002). In other words, through new § 2254(d), the AEDPA introduced preclusion into federal habeas corpus for the first time.[8] *See Harrington v. Richter,* 562 U.S. 86, 98-100 (2011) (describing § 2254(d) as a "relitigation bar"). Section 2254(d) disempowers a federal court from granting habeas relief on any claim that was adjudicated on the merits by the state court. The AEPDA included two statutory exceptions to this preclusion. First, preclusion will not apply where the state court's adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by this

---

[8] Congress amended § 2254 in 1966, placing it in a form close to its existence today. 89 P.L. 710; 80 Stat. 1104. Section 2254(a) limited federal courts to entertaining habeas corpus applications from persons confined pursuant to a state court's judgment "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." Two extant paragraphs regarding exhaustion, formerly comprising the entirety of Section 2254, were renumbered (b) and (c), respectively, and Section 2254(d) was created for the first time.

Taking its cue from the Supreme Court's observation in prior cases that federal district courts may rely upon reliable state court resolutions of material factual disputes, the new subsection 2254(d) provided that "a determination after a hearing on the merits of a factual issue, ... evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct," unless it "appeared" to the court that one of various circumstances existed calling into question the reliability of the state court's factual findings. If none of the circumstances appeared to the federal court, then the applicant had a burden to establish, by convincing evidence, that the factual determination by the state court was erroneous at an evidentiary hearing. Subsection 2254(d) was interpreted by the federal courts as "mandating deference" to the state court's factual findings. *See, e.g., Greene v. Georgia*, 519 U.S. 145, 146 (1996); *Parker v. Dugger*, 498 U.S. 308, 320 (1991).

In 1996, Congress passed the AEDPA. Congress intended the AEDPA to further the goals of comity between state and federal courts, finality of criminal judgments, and federalism. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). Section 104(2) of the AEDPA "redesignated" subsection (d)—the "deference" provision—as subsection (e), and then amended it to the form it takes now. Section 104(3) of the Act then "inserted" a "new" provision at 28 U.S.C. § 2254(d). Congress thus never intended for § 2254(d) to be applied as a deference provision and understood that it was inserting a wholly new doctrine—preclusion—into federal habeas corpus jurisprudence.

Court. 28 U.S.C. § 2254(d)(1). Second, preclusion will not apply where the state court's adjudication of the claim 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. *Id*. § 2254(d)(2).

These exceptions "allow[] habeas petitioners to avoid the bar to habeas relief imposed with respect to federal claims adjudicated on the merits in state court." *Wilson v. Corcoran*, 562 U.S. 1, 5 (2010). They "do[] not repeal the command of § 2254(a) that habeas relief may be afforded to a state prisoner 'only on the ground' that his custody violates federal law." *Id*. at 5-6. Besides the statutory exceptions, a court's power to apply preclusion is also circumscribed—as it is for any statute or rule—by the due process clause. In short, § 2254(d) is a threshold procedural inquiry that requires a federal court to scrutinize the state court's adjudication of a habeas claim for indicia of unreliability sufficient to warrant plenary federal review of the claim of unlawful confinement. If the state court's adjudication passes scrutiny, relief on the claim is barred *notwithstanding* its merit.[9]

In *Neal v. Puckett*, 286 F. 3d 230 (5th Cir. 2002), the Fifth Circuit sitting *en banc* held that it was not the state court's legal reasoning that mattered when ascertaining whether the (d)(1) exception was present, but rather the outcome. *Neal's* holding that a federal court must simply determine whether the state court outcome was reasonable has been applied in countless cases in the district and appellate courts

[9] Accordingly, when a court undertakes a § 2254(d) analysis, it is not reviewing the merit of habeas claims or applying "deference" to a state court's factual findings or legal reasoning. It is instead making a procedural inquiry about the reliability of the state court's adjudication and hence whether preclusion will be applied to foreclose or render moot federal review of the claim.

since then to avoid scrutiny of the state court's reasoning when determining whether a decision was contrary to or involved an unreasonable application of federal law.[10] *See, e.g., Green v. Thaler*, 699 F.3d 404, 414 (5th Cir. 2012); *Charles v. Stephens*, 736 F.3d 380, 387-88 (5th Cir. 2013); *Garcia v. Quarterman*, 454 F.3d 441, 444 (5th Cir. 2006); *Poindexter v. Dretke*, 346 F.3d 142, 148 (5th Cir. 2003).

After this Court decided *Harrington v. Richter*, 562 U.S. 86 (2011), Fifth Circuit decisions began using language from that opinion as justification for the *Neal* decision. *Richter* held that the § 2254(d) procedural bar applied to decisions of state courts that were summary in nature and contained no reasoning (from any court at all). In that situation, *Richter* held that the federal court could not find any of the exceptions present if *any* arguments or legal theories the state court *could* have given to support its outcome were reasonable. *Id.* at 102 ("Under § 2254(d), a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court."). Thus, for unreasoned decisions, this Court effectively adopted an outcome-only rule like *Neal*. The Fifth Circuit's outcome-only rule, however, applies to *all* decisions, whether reasoned or unreasoned. As a panel of the Fifth Circuit recently observed, "Our court has understood [*Richter's* outcome-only] framework to apply even where a state-court opinion exists." *Langley*

[10] *Neal's* holding was inconsistent with the statutory text, as it is not possible to ascertain whether a state court decision "involved" an unreasonable application of federal law without examining its reasoning.

v. Prince, 890 F.3d 504 (5th Cir. 2018)[11] (citing *Evans v. Davis*, 875 F.3d 210, 216 (5th Cir. 2017); *Clark v. Thaler*, 673 F.3d 410, 418 (5th Cir. 2012); *Santellan v. Cockrell*, 271 F.3d 190, 193-94 (5th Cir. 2001)).

This Court's *Wilson v. Sellers* decision made clear that, where a reasoned state court decision exists, its reasoning is relevant to whether the decision was contrary to, or involved an unreasonable application of, federal law under (d)(1) or was based on an unreasonable determination of fact under (d)(2). If only the outcome were relevant to ascertaining whether the § 2254(d) exceptions are present, there would be no need for a "look through" doctrine at all. Moreover, *Wilson* explicitly instructs that a federal court conducting a § 2254(d) assessment scrutinize the reasoning of the relevant state decision: "Deciding whether a state court's decision 'involved' an unreasonable application of federal law or 'was based on' an unreasonable determination of fact requires the federal habeas court to 'train its attention on the particular reasons—both legal and factual—why state courts rejected a state prisoner's federal claims[.]'"[12] *Wilson*, 138 S. Ct. at 1191-92. The decision also explicitly rejected the view that *Richter's* outcome-only rule applied "where there is a reasoned decision by a lower state court." *Id*. at 1195.

---

[11] The Fifth Circuit, however, issued a Briefing Order in this case on October 15, 2018 pursuant to the intervening decision in *Wilson v. Sellers*. *See* App. Tab 6.

[12] Although the difference between *Neal*'s and *Wilson*'s understandings of how (d)(1) should be applied may not appear to make a difference on the surface, the implications are significant. Judging only the outcome of a state court's disposition of a claim—prisoner loses—is far more deferential than looking past the outcome to the reasoning. In other words, an outcome may be reasonable even when the state court's reasoning is not. The *Neal* decision itself recognized that the outcome of that case depended upon whether the federal court examined the reasoning of the state court or only its outcome under § 2254(d)(1). *Neal*, 286 F. 3d at 244-45. And this Court in *Wilson* observed that, had it applied such an outcome-only rule like *Neal* in a case like *Premo v. Moore*, 562 U.S. 115 (2011), "our opinion … would have looked very different." *Wilson*, 138 S. Ct. at 1195.

Although a per curiam *en banc* decision, *Neal* was provisional when it was rendered. Its holding was explicitly made "[i]n the absence of clear guidance from the Supreme Court" as to how to conduct a (d)(1) assessment. *Neal*, 286 F.3d at 246. That clear guidance has arrived in *Wilson*.

B. Application of 28 U.S.C. § 2254(d)'s Procedural Bar in this Case

Wilson was an intervening decision in Batiste's case. The district court operated on pre-*Wilson* Fifth Circuit precedent, holding that it was to only concern itself with whether the outcome of the state court's adjudication of Batiste's *Strickland* claim was unreasonable. Thus, the district court did not engage in the kind of analysis required by *Wilson* and failed to train its attention on and scrutinize all the particular legal and factual bases cited by the state court for its rejection of Batiste's claim.

In his reply to the Director's opposition to his COA motion, and in a subsequent response to supplemental authorities filed by the Director, Batiste urged the Fifth Circuit to hold that *Wilson* rendered the district court's application of § 2254(d) debatable and warranted, at a minimum, granting COA to permit the parties to brief the issue. Specifically, Batiste pointed out that, had the Fifth Circuit's outcome-only rule not been in force, he could have urged, and the district court would have been required to consider, whether particular reasoning contained in the state court's decision was contrary to or involved an unreasonable application of federal law or was based on an unreasonable determination of the facts in the following regards.

First, Batiste could have argued on appeal that the state habeas court's reasoning that he could not establish prejudice because he did not prove to the state court's satisfaction that he in fact had frontal lobe damage, ROA.7245, was contrary to and an unreasonable application of *Strickland*'s prejudice standard in that it imposed a higher burden than required, *see Porter v. McCollum*, 558 U.S. 30, 43 (2009) (per curiam) (unreasonable to discount entirely the effect a neuropsychologist's brain damage finding might have had on the jury because it was impeached). In Batiste's case, the State offered no impeaching evidence whatsoever to rebut Dr. Underhill's expert neuropsychological findings, yet the state court rejected the allegation and refused to consider its mitigating import.[13]

Second, Batiste could have argued that the state habeas court's reasoning that he could not demonstrate deficient performance for trial counsel failing to investigate his organic brain damage because three mental health experts were retained and provided no information to trial counsel that Batiste had any indicia of frontal lobe disorder, ROA.7218-19, 7246, was contrary to and an unreasonable application of *Strickland*. Strickland and its progeny require that deficient performance be judged not by what reasonable investigative steps counsel may have taken, but by whether counsel unreasonably failed to take certain investigative steps in light of the information they possessed.[14] *See Rompilla v. Beard*, 545 U.S. 374, 392 (2005)

---

[13] Batiste also argues that the state habeas court's holding that he does not suffer from frontal lobe damage, ROA.7245, was an unreasonable determination of fact in light of the evidence presented in state court proceedings under § 2254(d)(2).

[14] Batiste also argues that the state habeas court's factual finding that "counsel had no information from any expert, investigator, record, family member, or friend indicating that the applicant had any indicia of frontal lobe disorder," ROA.7203; 7219, was an unreasonable determination of fact under § 2254(d)(2). *See* Statement of the Case, *supra*. (Defense counsel asked

(deficient performance found despite trial counsel having hired three mental health experts who examined client pre-trial and found "nothing helpful" to his case, where available school, medical, and prison records that counsel never saw contained "red flags" "pointing up a need to test further," and when client was later tested he was found to "suffer[] from organic brain damage"); *Wiggins v. Smith*, 539 U.S. 510, 533 (2003) (choices made after incomplete investigation are reasonable only to the extent that reasonable professional judgments support the investigative limitations).

Batiste's trial counsel possessed information that he had been hospitalized for meningitis as a child but made no effort to meaningfully investigate the consequences of that on Batiste's neurodevelopment.[15] Although counsel retained mental three experts who examined Batiste before trial (but found nothing helpful and so were never called to testify), ROA.7218-19, none was qualified to speak to Batiste's neurodevelopment as a board-certified psychiatrist or neurologist. ROA.8438, 8242, 8362.

Third, Batiste could have argued that the state habeas court's reasoning that he failed to demonstrate "that trial counsel rendered ineffective assistance such that their performance was not in accord with prevailing professional norms when their pre-trial investigation included retaining two psychologists and an expert in substance abuse," ROA.7246, was contrary to and an unreasonable application of

---

Batiste's mother about what she called "meningitis on his brain" and introduced hospital records showing that Batiste was hospitalized for ten days in the Memorial Hermann Hospital Pediatric Intensive Care Unit with bacterial meningitis when he was nine months old. ROA.7843, 46.)

[15] The potential harm was readily knowable even without having first consulted an appropriate expert: a cursory Internet search regarding the effects of bacterial meningitis would have quickly revealed to trial counsel that significant permanent brain damage and intellectual disabilities can stem from an early childhood infection.

Strickland and *Rompilla* because it applied arbitrary professional norms of its own creation rather than applying the specific American Bar Association Guidelines concerning competent mental health evaluation standards, *see Rompilla*, 545 U.S. at 387 (the Court has long referred to the ABA standards as guides to determining what is reasonable in performing constituent parts of a constitutionally adequate mitigation investigation); ABA Guidelines 4.1(A)(2).

The ABA Guidelines in effect at the time of Batiste's trial specifically address the need to thoroughly investigate a client's medical history and/or provide medical insights that may explain or lessen a client's culpability through the use of neurological and psychiatric experts. "Neurological and psychiatric impairment … are common among persons convicted of violent offenses on death row. The defendant's psychological and social history and his emotional and mental health are often of vital importance to the jury's decision at the punishment phase. Creating a competent and reliable mental health evaluation consistent with prevailing standards of practice is a time-consuming and expensive process. Counsel must compile extensive historical data, *as well as obtain a thorough physical and neurological examination*. Diagnostic studies, neuropsychological testing, appropriate brain scans, blood tests or genetic studies, and consultation with additional mental health specialists may also be necessary." Guideline 4.1 cmt. at 956 (emphasis added). [16]

[16] The duty to further investigate with a competent neuropsychologist or neurologist's assistance was particularly acute given trial counsel's chosen defense strategy of focusing on mitigation: "The guilt/innocence phase of the trial was indefensible as both Mr. Batiste and I knew well. The crimes were about as cold as it gets, especially the white Cadillac case. His history and gang activity … made

Fourth, Batiste could have argued that the state habeas court's reasoning that post-conviction expert Dr. Underhill's specific conclusion "regarding applicant's alleged inability to calculate risk and weigh the consequences of his actions is cumulative of Scott Kreiger's punishment testimony concerning the results of [testing] which indicated that the applicant was impulsive and preferred action over thought and reaction," ROA.7220, was contrary to and an unreasonable application of clearly established Supreme Court law. *See Arizona v. Fulminante*, 499 U.S. 279, 299 (1991) (jury could have believed two confessions reinforced and corroborated one another and thus were not merely cumulative).[17]

Fifth, Batiste could have argued that the state habeas court's reasoning that the outcome of trial would not have been different "had a defense involving general cognitive functioning been advanced when… the evidence of the applicant's two capital murders, an aggravated robbery, and multiple bad acts was particularly strong," ROA.7246, was contrary to and an unreasonable application of clearly established federal law in that the court improperly weighed aggravating factors against mitigating evidence. Texas's capital sentencing scheme does not allow for this. *See Strickland v. Washington*, 466 U.S. 668, 695 (1984) ("The governing legal standard plays a critical role in defining the question to be asked in assessing the

---

future dangerousness fairly hopeless to be honest. *Mitigation was our best, and really only, opportunity to save his life at trial*." ROA.7083-84 (emphasis added).

[17] Batiste also argues that the state habeas court's factual finding that testimony from Dr. Underhill would have been cumulative of Kreiger's testimony, ROA.7220, was an unreasonable determination of fact under § 2254(d)(2), because there was no testimony at trial that Batiste suffered from brain damage. Kreiger only testified that the non-neurological testing he performed indicated that young Batiste "was impulsive and preferred action over thought and reaction." ROA.2730-31.

prejudice from counsels' errors") and *Ex parte Gonzales*, 204 S.W.3d 391, 394 (Tex. Crim. App. 2006) ("Texas' capital sentencing scheme does not involve the direct balancing of aggravating and mitigating circumstances. It asks the jury to answer a mitigation issue.").

Sixth, Batiste could have argued that the state habeas court's reasoning that the outcome of trial would not have been different "had a defense involving general cognitive functioning been advanced," ROA.7246, was contrary to and an unreasonable application of clearly established Supreme Court law because the court failed to perform a cumulative prejudice analysis that considered the totality of the sentencing phase evidence (both adduced at trial and in the habeas proceeding). Instead, the court assessed prejudice item-by-item. See *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000) (cumulative prejudice analysis necessitates weighing "the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding").

The Findings of Fact and Conclusions of Law entered by the convicting court did not examine trial counsel's acts of deficient performance cumulatively; nor did it evaluate the resultant prejudice cumulatively. ROA.7245-63. Rather, the convicting court performed its *Strickland* analysis individually on each allegation of inadequate representation *seriatim*. *Id.* The district court improperly excused the state court's failure to perform the correct legal analysis with the following statement: "For the reasons discussed with regard to each allegation of *Strickland* error, it is not reasonably probable that the cumulative effect of different representation would have

brought about a different result." ROA.7947. In *Williams v. Taylor*, the Supreme Court held that the Virginia Supreme Court's *Strickland* prejudice analysis was unreasonable under § 2254(d) precisely because it failed to evaluate the cumulative totality of, and to accord appropriate weight to, the available mitigation evidence. 529 U.S. 362, 397-98 (2000).

. . .

Finally, the Fifth Circuit did not discuss or even cite to *Wilson* in its opinion. While it did discuss the state habeas court's reasons, it did so only in the context of identifying reasoning it believed to be reasonable—as opposed to considering what may have been *un*reasonable—and failed to consider or explain why reasonable jurists could not debate whether the (d)(1) or (d)(2) exceptions to the prior-adjudication bar were met based on these arguments.

II. The Fifth Circuit Should Have Concluded that the Intervening Decision in *Wilson v. Sellers* Meant Reasonable Jurists Could Disagree About the District Court's Pre-*Wilson* Application of 28 U.S.C. § 2254(d), Wherein the District Court did not Scrutinize the State Court's Reasoning in the Reasoned Decision Below

In denying Batiste a Certificate of Appealability, the Fifth Circuit misapplied 28 U.S.C. § 2253 in two ways that caused a wrongful denial of his appeal on whether the district court erroneously applied § 2254(d).

A. Misapplication of 28 U.S.C. § 2253(c)

"[T]he only question" at the COA stage was "whether [Batiste] has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate

to deserve encouragement to proceed further." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). When the district court denies a claim under 28 U.S.C. § 2254, a COA should issue if "reasonable jurists could debate whether" the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "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." 28 U.S.C. § 2254(d); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Miller-El*, 537 U.S. at 338. Moreover, "'[w]here the petitioner faces the death penalty, any doubts as to whether a COA should issue must be resolved in the petitioner's favor.'" *Rhoades v. Davis*, 852 F.3d 422, 427 (5th Cir. 2017).

The Fifth Circuit held that it "agreed" with the district court's application of § 2254(d)'s relitigation bar. App. Tab 1. But whether the district court legally erred in its application of § 2254(d) would have been an appellate issue in the case had COA been granted. The Fifth Circuit's "agreement" with the district court is thus a ruling on the merits of an issue that was sought to be appealed.

Second, the Fifth Circuit decided the merits of the underlying *Strickland* claim, holding that "Batiste's trial counsel acted in an objectively reasonable manner in investigating, selecting and presenting mitigation evidence." App. Tab 1 at 10-11.

Moreover, it expressly based its denial of COA on this conclusion. *Id*. (denying COA expressly "*because*" trial counsel's performance was reasonable).

Per *Miller-El v. Cockrell*, 537 U.S. 322 (2003), the district court lacked jurisdiction to make these kinds of rulings on the merits of appellate issues. "[B]y first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, . . . [the district court] in essence decid[ed] an appeal without jurisdiction." *Id.* at 336-37. Moreover, it wrongly increased Batiste's burden at the COA stage by doing so. *See Buck*, 137 S. Ct. at 774 ("[W]hen a reviewing court (like the Fifth Circuit here) inverts the statutory order of operations and first decides the merits of an appeal, then justifies its denial of a COA based on its adjudication of the actual merits, it has placed too heavy a burden on the prisoner *at the COA stage*." (brackets, ellipses, and internal quotation marks omitted; emphasis in original)).

B. Denial of Meaningful Opportunity to Brief the Issues Raised by *Wilson v. Sellers*

Batiste filed his Application for a Certificate of Appealabilty and Supporting Brief on March 5, 2018. As *Wilson v. Sellers* was not decided until a month later, on April 17, 2018, Batiste never had a chance to fully brief the issues raised in that opinion applicable to his case—namely, that the district court erred by failing to scrutinize the state court's reasoning and decision for whether it was contrary to, or involved an unreasonable application of, clearly established federal law as determined by this Court in concluding that Batiste's trial counsel did not perform

deficiently under *Strickland* in investigating, selecting, and presenting mitigation evidence, and that prejudice was not shown.

The issuance of *Wilson* should have provoked the Fifth Circuit to grant COA in this case and hear appellate arguments on whether the district court's application of 28 U.S.C. § 2254(d) was consistent with *Wilson*. The Fifth Circuit did not even discuss the applicability of *Wilson* when deciding whether "the District Court's application of AEDPA to petitioner's constitutional claims and [its] resolution was debatable amongst jurists of reason." *Miller-El*, 537 U.S. at 336 (2003); *see also Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (concentrating the inquiry at the COA stage on the "district court's assessment" of the constitutional claim). Among the instances where the district court's application of AEDPA to Batiste's constitutional claim are debatable amongst reasonable jurists post-*Wilson* are those listed *supra*, pp. 13-18.

A single, antecedent unreasonable application of clearly established federal law as determined by this Court or unreasonable determination of the facts in light of the evidence presented made by the state habeas court would have mandated plenary federal review of whether Batiste was confined in violation of federal law. *Panetti v. Quarterman*, 551 U.S. 930, 953-54 (2007) ("When a state court's adjudication of a claim is dependent on an antecedent unreasonable application of federal law, the requirement set forth in §2254(d)(1) is satisfied. A federal court must then resolve the claim without the deference AEDPA otherwise requires."); *Wiggins*, 539 U.S. at 528 (holding state court "based its conclusion, in part, on a clear factual

error" and "[t]his partial reliance on an erroneous factual finding . . . highlights the unreasonableness of the state court's decision"); *Williams v. Taylor*, 529 U.S. at 395-97 (state court had unreasonably applied federal law to *Strickland*'s prejudice prong by, *inter alia*, failing to consider the impact of mitigation evidence on the defendant's moral culpability, as opposed to future dangerousness). *Panetti* unequivocally holds that a state court's adjudication of a claim involves an unreasonable application of clearly established law when it is "dependent on an antecedent unreasonable application of federal law." *Panetti*, 551 U.S. at 953.

In death penalty cases, all doubts about the issuance of a COA should be resolved in favor of the petitioner. *See Pippen v. Dretke*, 434 F.3d 782, 787 (5th Cir. 2005) (citing *Medellin v. Dretke*, 371 F.3d 270, 275 (5th Cir. 2004)). Accordingly, the Fifth Circuit should have issued a COA, at a minimum, to allow the parties to brief on appeal the question of how *Wilson* impacted the appropriateness of the district court's § 2254(d) determinations. (The Fifth Circuit is doing just that now in a case that is identically situated to Batiste's. *See* Fifth Circuit Briefing Order in *Langley v. Prince*, No. 16-30486 (October 15, 2018), App. Tab 6.) By denying COA in the first instance, the Fifth Circuit assumed jurisdiction over a question of law that had not been fully briefed in the parties' COA pleadings, which violated the general rule of appellate restraint and deprived both sides of a meaningful opportunity to raise and respond to the relevant legal arguments.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, Batiste prays that this Court grant a writ of certiorari to resolve the Questions Presented.

Respectfully submitted,

KENNETH W. MCGUIRE*
McGuire Law Firm
P.O. Box 79535
Houston, Texas 77279
(713) 223-1558
kennethmcguire@att.net
*COUNSEL OF RECORD

/s/ *Kate Sauer Pumarejo*
KATE SAUER PUMAREJO
P.O. Box 204472
Austin, TX 78720
(917) 597-2876
katespumarejo@gmail.com

Attorneys for Petitioner

January 11, 2019