

CASE NO. _____ (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

CHRISTOPHER DEVON JACKSON,
Petitioner,

v.

LORIE DAVIS, DIRECTOR,
Respondent.

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

CORRECTED PETITION FOR A WRIT OF CERTIORARI

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Dated: July 29, 2019

QUESTION PRESENTED

CAPITAL CASE

Trial counsel was aware that Christopher Jackson had a childhood history of mental health diagnoses (including schizophrenia and bipolar disorder) and had Child Protective Services records showing that he “was on a record breaking number of psychiatric medications.” However, counsel failed to conduct a follow-up investigation or obtain a comprehensive mental health evaluation in contravention of this Court’s holding in *Wiggins v. Smith*, 539 U.S. 510 (2003), that effective counsel have a duty to follow up on known information that might reasonably lead to the discovery of mitigating evidence. Yet the Fifth Circuit refused to grant a COA to permit appellate review of the district court’s denial of habeas relief. The Question Presented is:

Where the district court wrote that Petitioner “raises issues worthy of judicial review,” has the Fifth Circuit again applied an overly restrictive standard for granting COA and has Petitioner established that the reasonableness of the state court’s denial of his claim of ineffective assistance of counsel is, at least, debatable among reasonable jurists?

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The opinion of the United States Court of Appeals for the Fifth Circuit is unpublished. It appears in the appendix and is reported as *Jackson v. Davis*, 756 Fed Appx 418 (5th Cir. 2018).

The opinion of the United States District Court for the Southern District of Texas denying the petition for habeas corpus is unreported and appears in the appendix.

JURISDICTION

The Court of Appeals denied relief on December 10, 2018, and denied a timely petition for rehearing on February 19, 2019. On June 17, 2019, Justice Alito extended Mr. Jackson's time to petition for certiorari to July 10, 2019. This Court has jurisdiction under 28 U.S.C. § 1254.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part:

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

The Fourteenth Amendment to the United States Constitution provides in relevant part:

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law[.]

28 U.S.C. § 2254 provides in relevant part:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) 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 unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(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

Procedural History

Mr. Jackson is a death-sentenced prisoner who has been housed by the Texas Department of Criminal Justice at Jester IV, a psychiatric facility, since 2013.

In February 2006, Mr. Jackson was charged with killing Eric Smith while committing or attempting to commit a robbery in Houston, Texas. The State alleged that Mr. Jackson shot Mr. Smith in the process of stealing his car and elected to pursue the death penalty.

After a four-day trial, Mr. Jackson was found guilty of capital murder. The case then proceeded to the penalty phase, where the State presented thirty-eight witnesses over two-and-a-half days. *Id.* at 8. The defense presented testimony from just five witnesses lasting less than two hours. The jury sentenced Mr. Jackson to death.

The Texas Court of Criminal Appeals affirmed the conviction and sentence on appeal. *Jackson v. State*, 2010 WL 114409 (Tex. Crim. App. Jan. 13, 2010). This Court denied certiorari. *Jackson v. Texas*, 562 U.S. 844, 131 S. Ct. 82, 178 L. Ed. 2d 53 (2010).

While the decision of Mr. Jackson's direct appeal was pending, he filed a state application for habeas corpus. The State recommended that Mr. Jackson's relief be denied and submitted its own proposed findings of fact and conclusions of law. After an evidentiary hearing, the trial court adopted the State's proposed findings verbatim, and recommended that relief be denied. The Texas Court of Criminal

Appeals adopted the trial court's position and denied Mr. Jackson's application for relief. *Ex parte Jackson*, 2014 WL 5372347 (Tex. Crim. App. Aug. 20, 2014) (per curiam).

Following the denial of state habeas relief, Mr. Jackson sought the appointment of counsel, which was granted, and filed a federal petition for habeas corpus. After allowing limited discovery, and without conducting an evidentiary hearing, the district court denied habeas relief and a Certificate of Appealability. *See attached appendix* (Memorandum and Order of March 6, 2018) (Harmon, J.).¹

Mr. Jackson then applied for a Certificate of Appealability in the Fifth Circuit Court, which was denied. *Jackson v. Davis*, 756 Fed. Appx. 418 (2018).

Mr. Jackson now requests this Court grant a writ of certiorari.

Facts Relevant to this Petition

Christopher Jackson had a childhood history of serious mental illnesses that were treated with an unusually strong regiment of anti-psychotic medications. As the district court explained, at age eleven, Mr. Jackson began hearing voices. At age thirteen, he began seeing a psychiatrist and was diagnosed with Depressive Psychosis. DCO at 26. Soon after a suicide attempt, Mr. Jackson was hospitalized and subsequently diagnosed with depression, post-traumatic stress disorder, and substance abuse. *Id.* Another psychiatrist diagnosed Mr. Jackson with bipolar disorder. While hospitalized again for suicidal thoughts, a psychiatrist diagnosed

¹ Cited in this Petition as "DCO" followed by the applicable page number.

him with depressive psychosis. *Id.* This pattern of suicidal ideation, hospitalization, and medication continued, resulting in similar diagnoses, and by age fifteen, one report stated that Mr. Jackson was on a “record breaking number of psychiatric medications.” *Id.* at 27. While in Texas Youth Commission custody, a psychologist diagnosed him with non-specific depressive disorder with psychotic features. *Id.* Prior to trial, Mr. Jackson again attempted suicide and was observed to be acutely psychotic. *Id.* A psychologist found that he manifested “bizarre and disruptive behaviors.” *Id.* Another psychiatrist prescribed medication and diagnosed him with bipolar disorder with psychotic features. *Id.*

Despite this stark history of mental illness, trial counsel did not conduct any additional investigation of Mr. Jackson’s mental health, and did not seek to obtain any of his Child Protective Service (“CPS”) records, or other institutional records, beyond those provided by the prosecution. Trial counsel had Mr. Jackson evaluated by a psychiatrist, Dr. Victor Scarano, but only for the purposes of competency to stand trial and not for the purpose of developing mitigating mental health evidence. Dr. Scarano was not provided with records of Mr. Jackson’s psychiatric history. Counsel also hired a mitigation investigator, whose duties were limited to reviewing the records obtained from the prosecution and interviewing Mr. Jackson.

At the sentencing phase of the trial, the State presented substantial evidence of future dangerousness, including a detailed showing of Mr. Jackson’s history of criminal and violent behavior. The State also presented testimony from a

psychiatrist, Dr. Gold, that, although Mr. Jackson had been previously diagnosed with schizophrenia and bipolar disorder, he showed no signs of mental illness at the time of his arrest. Dr. Gold further testified that Mr. Jackson was a malingerer who was faking his mental illness. DCO at 3-4.

Based on his limited investigation, and without consulting a mental health expert, and having only visited his client one time before trial, trial counsel decided not to present any evidence of Mr. Jackson's mental health, other than the mitigation investigator's few brief references to the CPS records. Instead, the defense presented evidence that Mr. Jackson had a chaotic and unstable family life and that his mother was a poor parent who had little interest in him and eventually gave up her parental rights. DCO at 4-5. Having failed to conduct an adequate mental health examination, defense counsel had no evidence to rebut Dr. Gold's testimony.

In state habeas proceedings, trial counsel explained that he did not believe mental health testimony would be helpful, was afraid that presenting such evidence would lead to testimony that Mr. Jackson was sociopathic, and believed Mr. Jackson was a malingerer. DCO at 28-31.

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit Should Have Granted a COA on Petitioner's Claim that Trial Counsel was Ineffective for Failing to Further Investigate Information about His Significant History of Childhood Mental Illness and Obtain a Comprehensive Mental Health Evaluation.

In this capital case, trial counsel knew that his client, Christopher Jackson, had a history of mental illness dating back to his childhood. As the district court recounted, Mr. Jackson was diagnosed with various psychotic mental illnesses throughout his life. He started hearing voices at age eleven and was on anti-psychotic medication at the age of fourteen. Prior to his incarceration in the Harris County jail, no doctor had ever suggested that he was malingering or faking his illnesses. DCO at 24-25.²

The prosecution provided trial counsel with CPS records (he sought and obtained none on his own). CPS records showed that Mr. Jackson was diagnosed with numerous mental illnesses throughout his childhood such as the following: Schizoaffective Disorder; Major Depressive Disorder; Posttraumatic Stress Disorder; Conduct Disorder, Childhood Onset and Adolescent Onset; Impulse Control Disorder, and Bipolar I Disorder, Severe with Psychotic Features. The records also showed that he had been prescribed an unusually heavy regimen of anti-psychotic medication. DCO at 5. Reasonably competent counsel would have

² The district court also held that prior counsel presented these facts and that the issues surrounding counsel's strategies around mental health mitigation to the state court were addressed on the merits, and thus could be properly considered on habeas review. DCO at 24-25.

followed up on that information, conducted additional investigation, and made sure his client had a thorough evaluation by a mental health professional. But Mr. Jackson's counsel did none of these.

Indeed, this Court's case law requires that counsel in a capital case follow up on information available to him that could reasonably lead to the development of mitigation evidence. As part of a "thorough investigation" for "all reasonably available" mitigation evidence, counsel should, well before trial, seek out and thoroughly interview family members and others familiar with the client's life history and background. *Williams v. Taylor* 529 U.S. 362, 395-96, 416 (2000). An attorney who obtains only "rudimentary knowledge from a narrow set of sources," despite awareness that other mitigating evidence is reasonably available, is deficient. *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *see also Rompilla v. Beard*, 545 U.S. 374 (2005). Moreover, where counsel fails to discover mitigating evidence that was "reasonably available," counsel's performance can be deficient even where they have made other significant efforts. *See Williams*, 529 U.S. at 362.

Most importantly, effective counsel have a duty to follow up on information known to them. As established in *Wiggins*, "any reasonably competent attorney" is required to investigate further after receiving basic information because "pursuing these leads was necessary to making an informed choice" about the mitigation defense. *Id.*, 539 US at 525. Where counsel knows that his client has an extensive history of mental health problems, necessary follow up includes a thorough mental

health evaluation *before* any reasonable decision can be made to discard mental health mitigation. *See, e.g., Sears v. Upton*, 561 U.S. 945, 953 (2010).

Mr. Jackson’s trial counsel fell below these standards. Other than arranging a brief evaluation to determine his competency to stand trial – an evaluation that is far different, and less comprehensive, than an evaluation for mitigation³ – counsel conducted no further mental health investigation, obtained no further records, and did not seek or obtain any type of psychological testing or a comprehensive mental health evaluation.

Instead, counsel simply decided that he believed his client was malingering, and that any mental health evaluation would not produce any meaningful mitigation to present to the jury. But this Court has made clear that, without a reasonable investigation, such decision making is itself unreasonable. This Court explained that “counsel’s failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision ... because counsel had not ‘fulfill[ed] their obligation to conduct a thorough investigation of the defendant’s background.’” *Wiggins*, 539 U.S. at 521.

The facts underlying counsel’s failure to investigate are not disputed. But despite this Court’s clear and consistent explanations of effective counsel’s duty to

³ It is “beyond cavil that the scope of an evaluation for purposes of mitigation at capital sentencing is far broader than that for competency at trial.” *Blystone v. Horn*, 664 F.3d 397, 421 (3d Cir. 2011).

investigate, the Fifth Circuit determined that not only did Mr. Jackson's claim lack merit, but that it was so obviously lacking in merit that reasonable jurists could not debate the issue and denied a certificate of appealability (COA). Such a ruling not only evidences the Fifth Circuit's disregard for this Court's precedent, but it constitutes an abdication of its duty to allow reasonable appeals.

The Fifth Circuit has presented this Court with persistent problems in its application of the COA standard. This Court has reversed that court's decision to deny a COA on at least three prior occasions. *See Buck v. Davis*, 137 S. Ct. 759 (2017); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *Tennard v. Dretke*, 542 U.S. 274 (2004). In *Buck*, this Court had to remind that court once again that that the COA determination is a "threshold" inquiry and "is not coextensive with a merits analysis." 137 S. Ct. at 773. Courts undertaking a COA inquiry should "ask only if the District Court's decision was debatable." *Id.* at 774 (quoting *Miller-El*, 537 U.S. at 348) (internal quotation marks omitted). This Court has not needed to subject any other Circuit Court of Appeals to this level of review of its COA practice.⁴

Yet this case demonstrates that while the Fifth Circuit may have adopted the form required by *Buck*, it continues to ignore its substance. Thus, while it purports to apply the *Buck* standard, its actual holding ignores the threshold

⁴ In a certiorari petition filed on June 12, 2019, in *Halprin v. Davis*, No 18-9676, Petitioner Halprin, another death sentenced Texas inmate, attacks the Fifth Circuit's practice of routinely denying COA in capital cases. Mr. Jackson shares those sentiments, and adopts Petitioner Halprin's arguments.

standard. Mr. Jackson's claim easily meets the threshold standard. Regardless of the ultimate disposition of his claim, he should at least be entitled to full appellate review.

The Fifth Circuit's decision stands in sharp conflict with other Courts of Appeal. For example, in *Saranchak v. Beard*, 802 F.3d 579, 582 (3d Cir. 2015), the Court of Appeals expanded the COA granted by the district court (whether counsel was ineffective in his preparation for capital sentence) to include the question of whether counsel was ineffective for failing to secure the appointment of a mental health expert for mitigation purposes. Other Courts of Appeals have likewise granted COA when similar questions have been raised. *See, e.g., Smith v. Grews*, 735 F. App'x 178 (6th Cir. 2018) (COA granted on claim that counsel was ineffective for failing to investigate a mental health defense). *Accord King v. Westbrook*, 847 F.3d 788 (6th Cir. 2017); *Suggs v. McNeil*, 609 F.3d 1218 (11th Cir. 2010); *Walker v. Tru*, 401 F.3d 574 (4th Cir. 2005), *rev'd on other grounds*, 546 U.S. 1086 (2006); *King v. Kemna*, 266 F.3d 816 (8th Cir. 2001).

Here, even the district court, while denying relief and refusing to certify the issue for appeal, recognized that "Jackson's petition raises claims worthy of judicial review." DCO at 44. That recognition alone demonstrates that Mr. Jackson should be granted a COA, and that the Fifth Circuit has again strayed from the path required by this Court's case law. This Court's intervention is needed.

A. The district court’s assessment of whether trial counsel performed deficiently was debatable among jurists of reason.

The Sixth Amendment right to effective assistance of counsel is violated when counsel’s representation is deficient, in that it falls below “an objective standard of reasonableness,” and when the defendant is prejudiced, meaning that confidence is undermined in the outcome of the proceeding. *See Wiggins*, 539 U.S. at 521; *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Counsel has “a duty to bring to bear such skill and knowledge as will render the [proceeding] a reliable adversarial testing process.” *Id.* at 688. This can be done only if counsel prepares and investigates *thoroughly*. *Williams*, 529 U.S. at 397; *accord Porter v. McCollum*, 558 U.S. 30, 39 (2009).

The Fifth Circuit concluded that no reasonable jurist could disagree with the district court’s assessment of Mr. Jackson’s ineffective assistance claim because trial counsel fulfilled his responsibility to prepare for and present/conduct a penalty-phase hearing. Whether that conclusion is ultimately determined to be correct or not – and it is not – reasonable jurists could debate that ruling in light of the evidence that trial counsel: (1) failed to thoroughly investigate Mr. Jackson’s life history through witnesses or obtaining readily available records; (2) failed to allow their mitigation specialist to follow up with witnesses who knew of the abuse Mr. Jackson suffered and his mental health issues; (3) failed to obtain a complete mental health evaluation of Mr. Jackson; and (4) failed to develop or present any mental health mitigation evidence during the penalty phase.

1. Trial counsel performed deficiently because they failed to reasonably investigate mental health mitigation.

Mr. Jackson's trial counsel's performance was further deficient because they failed to adequately investigate mental health mitigation evidence. Prior to trial, Mr. Jackson's counsel hired a psychiatrist, Dr. Victor Scarano, and mitigation specialist, Bettina Wright, LCSW. However, Dr. Scarano provided a sworn statement that he was not asked to conduct a complete evaluation for purposes of developing mitigation evidence. Instead, he only conducted an initial competency evaluation. *See* appendix, Declaration of Victor R. Scarano, M.D., J.D., p. 3.⁵ *See Saranchak*, 802 F.3d at 594 ("not strategically reasonable for counsel to cite [a psychiatrist]'s opinion of Saranchak's competency as a basis for ruling out further investigation of Saranchak's mental health as it related to mitigation"). In addition, trial counsel failed to provide Dr. Scarano and Ms. Wright with Mr. Jackson's records that they each needed to adequately do their jobs. *See* appendix, Scarano Declaration; Declaration of Bettina Wright, LCSW, LCDC.⁶ Counsel's failure to provide the psychiatrist or mitigation specialist with records they requested prevented them from completing a thorough mental health evaluation or creating a mitigation case for Mr. Jackson. *Id.* Ms. Wright also provided sworn testimony that she was not permitted to conduct a complete investigation into Mr. Jackson's

⁵ ECF No. 75-3, p.3/Exhibit C of Amended Federal Petition.

⁶ ECF No. 75-4/Exhibit D of Amended Federal Petition

life history because she was limited to only interviewing Mr. Jackson and reviewing the records trial counsel provided. Wright Declaration pp.1, 3. Ms. Wright stated she would “normally conduct a comprehensive investigation of the defendant’s life story, including his mental health, his family history, interviewing family members, and reviewing any and all available records,” a job that would have taken months to complete. *Id.* at 3.

The records that counsel failed to give to the psychiatrist and mitigation specialist showed that Mr. Jackson was repeatedly diagnosed with serious mental illnesses as a child and was on a “record-breaking number of anti-psychotic medications.” DCO at 5. However, counsel failed to investigate this information and never sought or obtained a complete mental evaluation of Mr. Jackson by any psychiatrist, psychologist, or any mental health expert. *See Saranchak*, 802 F.3d at 593-94 (counsel’s performance was deficient when he knew that defendant had a history of mental health problems, but failed to investigate them further or secure a mental health evaluation for mitigation evidence).

Trial counsel excused their lack of investigation by claiming it was their strategy to not bring up Mr. Jackson’s mental illness out of fear that he would be deemed a psychopath, sociopath, or as having anti-personality disorder. State Habeas Hearing Transcript, p. 17 / ECF No. 95-25, p. 17. In addition, trial counsel claimed *post hoc* that he thought Mr. Jackson was malingering, which contributed to his decision not to present any mental health mitigation during the penalty

phase. State Habeas Hearing Transcript, p. 11 / ECF No. 95-25, p. 11. Counsel's unsubstantiated fears cannot justify the failure to conduct a reasonable investigation. Rather, counsel must first know what a comprehensive evaluation might uncover. It may be that a reasonable evaluation might produce unfavorable results and that reasonable counsel might then decide not to present mental health evidence. But until that evaluation is conducted, counsel has no reasonable basis upon which to make such a decision.

The same is true of counsel's concern that his client is malingering. As a lay person, counsel is in no position to make that determination without expert assistance. Moreover, counsel's uninformed belief about malingering is belied by the records demonstrating that Mr. Jackson faced mental health problems dating back to his childhood. Years before his capital case, Mr. Jackson had been consistently diagnosed with serious mental health impairments, and prescribed a regimen of powerful anti-psychotic drugs. These diagnoses and treatments demonstrate that Mr. Jackson's mental illness is real, and not something he recently manufactured in hopes of avoiding the death penalty.

The state habeas court accepted defense counsel's reasoning and the district court held that acceptance reasonable. DCO at 34-36. But both the state and district court's analyses were flawed because neither considered the impact of counsel's failure to investigate on their decision of what evidence to present. Instead, those courts focused their analyses on counsel's failure to present mental

health evidence. DCO at 35. This misses the point. The proper question is not whether defense counsel made reasonable decisions based upon the evidence known to them. Rather, the salient question is whether counsel made a reasonable decision not to further investigate Mr. Jackson's mental health and obtain a comprehensive mental health evaluation based on the information known to counsel. Neither the state court nor the district court directly addressed that question that lies at the heart of this appeal.

This Court has recognized that there may be cases in which defense consultation with an expert is a necessary and reasonable strategy. *Harrington v. Richter*, 562 US 86, 106 (2011). And in *Hinton v. Alabama*, 571 U.S. 263 (2014), this Court found that counsel's failure to properly secure and consult with a qualified expert was deficient performance. This case follows *Richter* and is like *Hinton*. Given Mr. Jackson's childhood psychiatric history, counsel's failure to conduct a follow-up investigation and secure a mental health evaluation for mitigation was deficient performance. And even if a court might ultimately disagree, *Richter* and *Hinton* demonstrate that the issue is debatable among reasonable jurists.

2. Trial counsel performed deficiently because they failed to conduct a thorough investigation into Mr. Jackson's life history.

Although Petitioner's request for certiorari is grounded in counsel's failure to investigate mental health evidence, it is worth noting that trial counsel's investigation of Mr. Jackson's background and history was likewise deficient. Mr.

Jackson's trial counsel failed to conduct a thorough investigation into Mr. Jackson's life history. Due to trial counsel's deficient performance, the jury never knew of the physical abuse Mr. Jackson suffered at the hands of his grandmother, and the prolonged sexual abuse perpetrated by his foster brother. The jury was deprived of an expert opinion on the impact of those significant life traumas, or an expert opinion on Mr. Jackson's full mental health history.

As in *Williams*, Mr. Jackson's trial counsel conducted an extremely limited investigation into Mr. Jackson's life and did not conduct their own independent document gathering. This Court has held that counsel's performance was deficient when counsel failed to make reasonable efforts to learn of information contained in files counsel knew existed. *Rompilla*, 545 U.S. at 391. Here, counsel knew of the hundreds of CPS records regarding Mr. Jackson but failed to make a reasonable effort to learn of their content; instead trial counsel only used the files the prosecution provided. As a result, trial counsel only obtained 137 out of over 400 documents of CPS records that were readily available to them. As the district court acknowledged, it was up to defense counsel to make a request for additional documents. DCO at 12. However, trial counsel made no request, and thus counsel failed to uncover significant information regarding Mr. Jackson's past, such as sexual and physical abuse, and previously diagnosed mental health issues.

Additionally, prior to trial, counsel failed to conduct interviews with some of Mr. Jackson's significant family members. Specifically, counsel never spoke to Mr.

Jackson's sister Candace, even though Jackson's grandmother talked to trial counsel's investigators about her. Because trial counsel never interviewed Candace and thus failed to present evidence of the sexual and physical abuse Mr. Jackson suffered at the hands of their grandmother. Wright Declaration. During the penalty phase, three of the five witnesses trial counsel presented were never interviewed or prepared to testify by trial counsel, which left them unprepared and susceptible to attack on cross-examination. While trial counsel presented five witnesses, none of them could testify to the full extent of the physical and sexual abuse Mr. Jackson suffered or the mental health issues Mr. Jackson experienced. A thorough investigation would have revealed that Mr. Jackson had other significant encounters with close friends, family, caseworkers, and doctors, who could have testified and provided a more complete framing of Mr. Jackson's life to the jury.

Similar to *Wiggins*, Mr. Jackson's trial counsel did not uncover evidence in their investigation to suggest that "further investigation would have been fruitless" because there were known witnesses readily available to testify to mitigation evidence and readily available CPS documents that counsel could have investigated further to present a more developed and well-crafted mitigation case. Although the district court found that trial counsel's investigation was adequate and reasonable, as this Court stated in *Williams*, when counsel fails to discover mitigating evidence that was "reasonably available" counsel's performance is therefore deficient. Thus, whether Mr. Jackson's counsel's performance was deficient is at least debatable.

B. The district court’s assessment of whether trial counsel’s failures prejudiced Mr. Jackson was debatable among jurists of reason.

This Court has made clear that the presentation of some mitigating evidence at trial does not preclude a finding of deficient performance or prejudice. *Sears v. Upton*, 561 U.S. 945, 954 (2010). For prejudice, the “undermines confidence” standard requires only “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. This standard is not a stringent one, and is less demanding than the preponderance standard. *See Williams*, 529 U.S. at 405-06; *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

In a capital sentencing proceeding, where a sentence of death can only be found by a unanimous jury, prejudice is therefore established where there is a reasonable probability that at least one juror, after hearing the unrepresented mitigating evidence, “would have struck a different balance.” *Wiggins*, 539 U.S. at 537; *see also Porter*, 558 U.S. at 42.

Here, trial counsel’s failure to obtain over two hundred CPS documents regarding Mr. Jackson’s early life left the jury without ever hearing his history of mental illness and evidence of abuse that Mr. Jackson suffered. The CPS records extensively show how Mr. Jackson was diagnosed with numerous mental illnesses throughout his childhood, including: Schizoaffective Disorder; Major Depressive Disorder; Posttraumatic Stress Disorder; Conduct Disorder, Childhood Onset and Adolescent Onset; Impulse Control Disorder; and Bipolar I Disorder, Severe with

Psychotic Features. Wright Declaration p. 5. Importantly, the records also indicate that it was recommended that Mr. Jackson remain in the custody of CPS in order to receive treatment and counseling “to begin to resolve the conflicts caused from sexual abuse, loss, and abandonment.” Report of Court Appointed Advocate, p. 1 / ECF NO. 86-6.

Counsel’s failure to obtain all of the CPS files underscores the absence of a comprehensive mental health evaluation. For example, trial mitigation specialist Ms. Wright explained:

A lot of the disorders Mr. Jackson was diagnosed with can be precursors of very specific disorders of adulthood....[A]fter our meetings, the DSM-IV-TR diagnosis I gave Mr. Jackson at age 22 was Schizoaffective Disorder, a psychotic disorder the onset of which typically occurs between the late teens and mid 30’s.

Wright Declaration p. 5-6.

By reviewing only minimal records and interviewing Mr. Jackson for a limited time, Ms. Wright came to the same conclusion as Mr. Jackson’s past doctors – that he likely has Schizoaffective Disorder. *Id.* Ms. Wright also would have been able to explain to the jury why Mr. Jackson’s life history and mental illnesses were mitigating. *Id.* p. 9.

Forensic psychiatrist Dr. Scarano was hired by trial counsel, but was not provided with the records of his mental health history and was only tasked with performing a competency evaluation. Scarano Declaration p.3. However, post-trial, Dr. Ray Hays, a licensed psychologist, reviewed Dr. Scarano’s early work and Mr.

Jackson's CPS and medical records, ultimately concluding, like the many physicians before him, that Mr. Jackson suffers "major mental illness". *See* appendix, Declaration of James Ray Hays, Ph.D., J.D., p. 3.⁷ Additionally, Dr. Hays reviewed Mr. Jackson's past medical history and provided a complete and critical mental health diagnosis for Mr. Jackson:

My conclusion from the review of materials in this matter is that Mr. Jackson suffered from and continues to suffer from a chronic and persistent mental illness and suffered physical and sexual abuse as a child. The symptoms and consequences of such mental illness and abuse have a major impact on the life of one who suffers from these problems.

Id. at 4. This was information that was not conveyed to the jury because trial counsel failed to investigate, develop, or present mental health mitigation evidence.

Trial counsel's failure to investigate Mr. Jackson's mental health left the defense with an even greater problem. The prosecution elicited testimony from a psychiatrist that he saw no signs of bipolar disorder or schizophrenia at the time of Mr. Jackson's arrest. In addition, the State's expert opined that Mr. Jackson was a malingerer. DCO at 4. Yet, despite Mr. Jackson's documented history of serious mental health impairments, the defense stood silent in the face of that testimony. Because counsel had failed to conduct an appropriate mental health investigation, the defense had no way to rebut this devastating testimony. This failure alone was sufficient to show that the existence of prejudice is debatable.

⁷ ECF No. 75-5, p. 3/Exhibit E of Amended Federal Petition, p. 3.

Furthermore, by failing to obtain documents on Mr. Jackson's life, trial counsel prejudiced Mr. Jackson by preventing their own mitigation specialist, Ms. Wright, from interviewing more witnesses and conducting her own records investigation. Wright Declaration p. 3-4. If permitted, Ms. Wright would have been able to thoroughly investigate Mr. Jackson's family and could have explained to the jury Mr. Jackson's background and family history of abuse and mental illness, and the traumatic impact of suffering loss. *Id.* at 9.

The district court concluded that much of the information Mr. Jackson presented in state habeas proceedings was similar to what trial counsel presented to the jury. DCO at 20. This conclusion was incorrect because trial counsel presented only a shallow version of Mr. Jackson's life to the jury instead of revealing the traumatizing abuse Mr. Jackson suffered or the seriousness of his mental illness and its impact on his actions. At the very least, the question of prejudice is debatable, and deserving of full briefing and comprehensive appellate review.

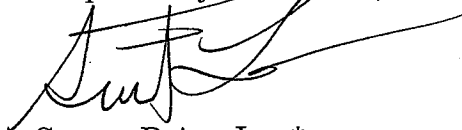
In *Rompilla* this Court explained that it was possible the jury would have considered the death penalty anyway, but held "that is not the test." Rather, based on the evidence "it goes without saying that the undiscovered mitigation evidence, taken as a whole, might well have influenced the jury's appraisal of [the defendant's] culpability." *Rompilla*, 545 U.S. at 393 (citing *Wiggins*, 539 U.S. at 538 and *Williams*, 529 U.S. at 398).

Here, the totality of mitigation evidence would have likely influenced the jurors' decision on the special issue questions because the jurors would have had a more in-depth understanding of Mr. Jackson's life. In fact, the jury was looking to learn more about Mr. Jackson during the penalty phase, as evidenced by the fact that during deliberations the jurors requested all records showing Mr. Jackson's mental health diagnoses. Jury Notes, ECF No. 95, p. 2. Therefore, if trial counsel had adequately investigated and presented mental health mitigation, the jurors would have learned not only of Mr. Jackson's extensive mental health diagnoses but also about the traumatizing physical and sexual abuse that Mr. Jackson suffered. Ultimately, there is a reasonable probability that this would have led to at least one juror returning a different result. In *Rompilla*, this Court found prejudice ensued based on the wealth of evidence and potential leads for mitigation investigation contained in trial counsel's file that were never investigated. *Id.* at 390–91. Here, trial counsel knew or should have known of Mr. Jackson's severe and long-standing mental health history, but never allowed any mental health expert to complete an evaluation of Mr. Jackson. Therefore, due to the lack of mitigation evidence presented to the jury, the district court's assessment of whether trial counsel's failures prejudiced Mr. Jackson was debatable among jurists of reason.

CONCLUSION

For these reasons, this Court should grant this petition for a writ of certiorari and place this case on its merits docket. In the alternative, this Court should grant certiorari, vacate the decision below, and remand this case to the Fifth Circuit with instructions to grant a Certificate of Appealability.

Respectfully submitted,



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