

CASE NO. 19-5430

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

REPLY IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI

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Dated: October 15, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI 1
CONCLUSION..... 8

TABLE OF AUTHORITIES

<i>Buck v. Davis</i> , 137 S. Ct. 759 (2017)	5
<i>Cullen v. Pinholster</i> , 563 U.S. 170 (2011).....	3, 4
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984).....	4, 5, 7
<i>Wiggins v. Smith</i> , 539 U.S. 510 (2003)	9

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Petitioner, Christopher Jackson, resides on death row in the maximum security psychiatric unit reserved for the most mentally ill of the State of Texas's inmates — Jester IV, in Fort Bend County. He has been housed at the Jester IV unit since 2013 on high doses of anti-psychotic medication. This is not surprising. Petitioner had a childhood history of serious mental illnesses and was treated by the Texas Youth Commission with powerful anti-psychotic medications. As the district court explained, at age eleven, Mr. Jackson began hearing voices. At age thirteen, he began seeing a psychiatrist. DCO at 26-27. Soon after a suicide attempt, Petitioner was hospitalized and diagnosed with depression and post-traumatic stress disorder. *Id.* Another psychiatrist diagnosed Mr. Jackson with bipolar disorder. While hospitalized again for suicidal thoughts, a psychiatrist diagnosed him with depressive psychosis. *Id.* The suicidal ideation, hospitalizations, and powerful medications continued. By age fifteen, Petitioner was on a “record breaking number of psychiatric medications.” *Id.*

But Petitioner's trial counsel, who met him just once prior to trial, decided that Petitioner was not mentally ill. It was trial counsel's belief that Petitioner was malingering. Trial counsel was not a doctor or mental health expert. Nor did trial counsel retain an expert to review his records and evaluate his mental health history. Trial counsel arrived at his personal belief that Petitioner was a malingerer before any mental health investigation was conducted. Trial counsel's

decision not to present mental health evidence was made without the benefit of an investigation. The jurors must have noticed. When the jurors requested to examine of Petitioner's medical records during their deliberations, they received only a fraction of medical records selected by the State in order to show its version of this issue, and that failed to show Petitioner's life-long history of severe mental illness.

The reasonableness of counsel's reliance on his own psychiatric judgement to forego investigation of Petitioner's mental health history is certainly subject to debate. Yet on state habeas, the court denied relief, adopting the State's proposed findings and conclusions, and crediting trial counsel's testimony that he did not pursue a mental health defense due to his belief that his client was malingering. Federal habeas relief was likewise denied. The district court found "Jackson's petition raises issues worthy of judicial review. Nevertheless, having considered the merits of Jackson's petition, and in light of AEDPA's standards and controlling precedent, this Court determines that a COA should not issue on any of Jackson's claims." DCO at 44. The Fifth Circuit refused to grant a COA to permit appellate review of the district court's denial of habeas relief. It is in this context that Petitioner comes to this Court.

Respondent has filed a lengthy brief in opposition ("BIO"). However, much of the BIO speaks to arguments not made by Petitioner. Respondent spends numerous pages arguing that a procedurally defaulted claim should not be the basis for a certificate of certificate of appealability (COA). Respondent also avers that

Petitioner cited the wrong standard to obtain a COA when Petitioner noted that the district court found “Jackson’s petition raises claims worthy of judicial review.” BIO at 3. As to the merits of Petitioner’s claim, the crux of Respondent’s argument is that Petitioner lost in the district court under the “double deferential” standard cited in *Pinholster*¹; therefore, reasonable jurists could not debate the merits of the underlying ineffective assistance of counsel claim.

Respondent’s arguments muddy the water of Petitioner’s straightforward question presented. To be clear, Petitioner’s question presented only relates to the exhausted penalty-phase ineffectiveness claim relating to the investigation of Petitioner’s mental health that was addressed on the merits. The District Court noted that this portion of the claim had been exhausted in state court and, thus, also addressed it on the merits. Any background facts presented in the initial petition related to the unexhausted portions of the claim were to provide context to the claims raised below. Moreover, Respondent acknowledges and addresses the exhausted section of Petitioner’s ineffectiveness claim. Respondent’s response to the defaulted claim, which is not before this court, obfuscates the legitimate issue raised by Petitioner.

With respect to Respondent’s allegation that Petitioner’s reference to the district court’s finding that “Jackson’s petition raises claims worthy of judicial review,” is the wrong standard for obtaining a COA, Respondent misunderstands

¹ *Cullen v. Pinholster*, 563 U.S. 170 (2011).

Petitioner’s argument. Petitioner never suggested that “worthy of judicial review” was the legal standard for the grant of a COA. Rather, Petitioner used the district court’s language to make an obvious point – that the merits of Petitioner’s claim raised significant constitutional questions, and the claim presented a worthwhile matter for the district court to consider, especially in a capital case. Petitioner cited to the proper standard for obtaining a COA, *see Petition* p.10-11. Again, Respondent’s argument obfuscates the legitimate issue raised by Petitioner.

Respondent addresses the merits of both prongs of a *Strickland* analysis: deficient performance and prejudice². Respondent cites to the facts presented below to argue that under *Strickland* and its progeny, and under the “double deferential” AEDPA standard cited in *Pinholster*, denying a COA was proper based on the state court’s findings and conclusions of law. But this misses the point. Every petitioner seeking a COA based on a denial on the merits pursuant to an AEDPA analysis lost because the federal court found that the state court acted reasonably in adjudicating the petitioner’s claim. As Respondent sees it, no petitioner should ever obtain a COA because he lost below under the restrictive and deferential AEDPA standards.

Whether the lower court’s conclusion is ultimately determined to be correct or not, the facts matter, and here reasonable jurists could debate the district court’s ruling in light of those facts. The bulk of Respondent’s BIO with respect to the

² *Strickland v. Washington*, 466 U.S. 668 (1984).

merits of the claim spins the facts in a manner favorable to the prosecution. That is not surprising and Respondents may ultimately prevail. Nevertheless, the undisputed facts of Petitioner's mental health history, as detailed in the TYC records, present legal circumstances, in the words of the district court, worthy of judicial review. At the very least, Petitioner's claim meets the threshold standard for obtaining a COA.

In *Buck v. Davis*, 137 S. Ct. 759 (2017), this Court reaffirmed 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. Respondent argues that trial counsel acted reasonably, and that Petitioner cannot show that the state court's application of *Strickland* was objectively unreasonable. Respondent's merits analysis might be correct, but that conclusion is debatable.

The debate centers on the reasonableness of trial counsel's rationale for not presenting mental health evidence. In state habeas proceedings, trial counsel explained that he did not believe mental health testimony would be helpful and was afraid that presenting such evidence would lead to testimony that Petitioner was sociopathic and a malingerer. DCO at 28-31. However, other than arranging a competency evaluation to determine Petitioner's competency to stand trial, counsel conducted no further mental health investigation, obtained no further records, and did not seek or obtain any comprehensive mental health evaluation. Most critically,

counsel believed his client was malingering after the only meeting they had – and that any mental health evaluation would not produce any meaningful mitigation evidence to present to the jury.

The records belie counsel’s belief about malingering. The records counsel failed to give to the psychiatrist (hired only for purposes of competency to stand trial) establish that Petitioner was diagnosed with serious mental illnesses since childhood and was medicated accordingly. This evidence existed years before Petitioner faced criminal charges as an adult, and disproves trial counsel’s uninformed personal belief that Petitioner was malingering. Trial counsel did not actually investigate whether his client was truly mentally ill; rather, counsel felt his client was malingering, and used that feeling as a *post hoc* rationale for not presenting the extensive mental health evidence to the jury. This *post hoc* rationalization puts counsel’s obligations in a capital case on its head – it is only after a reasonable investigation that counsel can be in an informed position to make reasonable decisions. As this Court has made clear, “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 v. Smith*, 539 U.S. 510, 521 (2003).

Respondent’s arguments on the merits of Petitioner’s claim only further support the case that reasonable jurists could disagree about the merits. For

example, Respondent points out that in trial counsel's post-conviction testimony he stated his belief that "Jackson did not have a mental illness" ... "Jackson was likely malingering and [counsel] did not want to lose his credibility with the jury by debating the point." BIO at 30. The Petition makes the point that counsel's unsubstantiated fears could not justify the failure to conduct a reasonable investigation because counsel must first know what a reasonable investigation would reveal. Without a reasonable investigation, counsel has no reasonable basis upon which to make such a decision. The salient point here is that the issue is debatable among reasonable jurists.

With respect to the prejudice prong of a *Strickland* claim, Respondent relies on the district court's finding that "the jury had before it the basic understanding of the neglect, deprivation, turmoil and pain in Jackson's childhood." BIO at 39 (citing to the district court opinion). The Petition details the long-standing and comprehensive nature of Petitioner's documented mental illness. Likewise, the Petition sets forth how, without a full mental health presentation, the jury did not know the history of mental illness and evidence of abuse that Petitioner suffered. Moreover, because counsel failed to conduct a reasonable mental health investigation, the defense had no way to rebut the testimony elicited from the prosecution's psychiatrist that he saw no signs of bipolar disorder or schizophrenia at the time of Petitioner's arrest.

The briefing in this case does not show a one-sided dispute. Rather, the arguments presented in both the Petition and the BIO demonstrate the question of ineffective assistance of counsel is debatable and deserving of appellate review. Petitioner's claim meets the minimal threshold standard required to obtain a COA.

CONCLUSION

For these reasons, this Court should grant Mr. Jackson's 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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