No. _____

SUPREME COURT OF THE UNITED STATES

DICKENS ETIENNE,
Petitioner,

v.

MICHELLE EDMARK
NH STATE PRISON, WARDEN
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The United States Constitution guarantees all criminal defendants effective assistance of counsel. A fundamental and threshold obligation of effective counsel is to conduct a proper investigation in advance of trial, especially as it pertains to potentially exculpatory evidence. "[S]trategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgments support the limitations on investigation." *Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (quotations omitted); *see also Porter v. McCollum*, 558 U.S. 30, 40 (2009) ("The decision not to investigate did not reflect reasonable professional judgment.").

Mr. Etienne was diagnosed with schizophrenia after his incarceration for the murder conviction underlying this Petition. While the State's post-conviction expert opined that she could not discern whether Mr. Etienne suffered from schizophrenia at the time of the alleged crimes, Mr. Etienne's post-conviction expert reached that conclusion. Following Mr. Etienne's arrest for the conduct underlying his conviction, he exhibited erratic and seemingly inculpatory behavior, which was relied upon by the State to secure its conviction. Mr. Etienne's trial counsel failed to investigate evidence—which was readily available—documenting Mr. Etienne's long history of mental illness, mental health hospitalization, and erratic behavior. Mr. Etienne's trial counsel failed to retain an expert to evaluate and diagnose Mr. Etienne prior to trial. Mr. Etienne's trial counsel, by their own admission, failed to counter the State's highly prejudicial use of Mr. Etienne's erratic and seemingly inculpatory post-arrest behavior. And Mr. Etienne's trial counsel failed to use the

exculpatory evidence they would have gained, had they conducted *any investigation* into Mr. Etienne's mental health, in pre-trial plea negotiations, at trial, or at sentencing.

The question presented—which finds its basis in this Court's clearly established precedent, involves an issue of growing national attention, and will become an increasingly recurring issue—is as follows:

Where there was evidence of a history of the defendant's mental health issues and mental health hospitalization and trial counsel failed to even initiate an investigation into the defendant's mental health, including as it related to the alleged crime of murder and the defendant's seemingly inculpatory post-arrest conduct successfully used against him at trial, did the First Circuit err in its cursory order denying a certificate of appealability on a claim of ineffective assistance of counsel?

LIST OF PARTIES

The parties are the same as those listed in the caption.

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The decision of the New Hampshire Supreme Court denying Mr. Etienne's direct appeal is reported as *State v. Etienne*, 35 A.3d 523, 163 N.H. 57 (2011), and reproduced in Appendix E.

The decision of the New Hampshire Superior Court denying Mr. Etienne's Petition for Writ of Habeas Corpus is unreported and produced in Appendix D. The decision of the New Hampshire Supreme Court denying Mr. Etienne's discretionary appeal of the Superior Court's decision is unreported and produced at Appendix C.

The district court's decision rejecting Mr. Etienne's federal Petition for Writ of Habeas Corpus is not yet reported and produced in Appendix B.

The decision of the district court issuing a blanket denial of any certificate of appealability was included in its order rejecting Mr. Etienne's federal Petition for Writ of Habeas Corpus which is unreported and produced in Appendix B.

The First Circuit's decision rejecting Mr. Etienne's request for a certificate of appealability on his ineffective assistance of counsel claim is unreported and produced in Appendix A.

JURISDICTION

The judgment of the First Circuit Court of appeals was entered on April 20, 2023. This Petition timely follows. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 2254 of Title 28 of the United States Code, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides, in relevant part:

> (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
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> (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.
>
> (e)
>
> (1)In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.
>
> (2)If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
>
> (A)the claim relies on—
>
> (i)a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii)a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B)the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Amendment VI 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 defence."

Section 2253 of Title 28 of the United States Code provides:

(a)In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b)There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)

(1)Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A)the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B)the final order in a proceeding under section 2255.

(2)A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3)The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

STATEMENT OF THE CASE

I. Introduction

The Petitioner, Dickens Etienne, has a history of mental illness dating back to 1995, including a suicide attempt in his teens. In fact, Mr. Etienne's was hospitalized in a mental health institution, Faulkner Hospital, in 1995. He then received follow-up treatment through a Massachusetts hospital for three years. Thereafter, in 1998, while in prison on charges not related to the conviction appealed here, he flooded his prison cell, soaking his room and mattress, was found with his pants tied around his neck attempting to hang himself, attempted suicide by swallowing a razor, and was found tied to a stretcher after smearing feces in a prison dayroom.

When the conviction for which he was serving prison time was reversed and he was sent back to the House of Corrections, he continued to report suicidal ideation, as well as auditory and visual hallucinations, and experienced unusual physical symptoms without a clear medical cause. When House of Corrections staff obtained Mr. Etienne's Faulkner Hospital records, they learned that the records showed evidence of hallucinations during Mr. Etienne's 1995 hospitalization. Three years later, Mr. Etienne was tried for murder in the trial underlying this Petition. All this information, and the relevant records, were readily available to trial counsel prior to, and at the time of, trial. Trial counsel were aware, because they had represented Mr. Etienne on the prior charges, that Mr. Etienne had a history of mental health issues, significant childhood trauma, and had been previously

committed to a mental health facility. Yet trial counsel failed to obtain Mr. Etienne's mental health records and they did not retain an expert to perform a mental health evaluation prior to, or at the time of, trial.

In fact, trial counsel were aware of all the following facts which should have prompted them to conduct an investigation into Mr. Etienne's mental health:

- Trial counsel were aware of Mr. Etienne's mental health history, including a suicide attempt and traumatic childhood, nine years before the trial and counsel did not seek mental health records;[1]
- Trial counsel were aware that Mr. Etienne suffered from irrational and paranoid thinking;[2]
- Mr. Etienne's attorneys were aware of multiple instances where Mr. Etienne had paranoid type beliefs that his attorneys were sharing privileged communications with the prosecution;[3]
- Trial counsel were aware of statements in discovery by Mr. Etienne's girlfriend that he had paranoid type thinking and thought that people were "snitching" on him when "there was nothing to snitch about;"[4]
- Mr. Etienne had paranoid type beliefs about the police;[5] and

[1] Doc. 3-8: 3; Doc. 3-7:17.
[2] Doc. 3-8: 3.
[3] Doc. 3-8:10.
[4] Doc. 3-8: 10.
[5] Doc. 3-8: 10.

- Trial counsel were on notice that Mr. Etienne had made a suicide attempt while awaiting trial, based on the discovery provided by the State prior to trial.[6]

In 2015, Mr. Etienne was diagnosed by a staff psychiatrist at the New Hampshire State Prison with schizophrenia, paranoid type.[7] In light of this diagnosis, and after obtaining Mr. Etienne's mental health and related records, post-conviction counsel retained Dr. Albert Drukteinis to perform a psychiatric evaluation.[8] Dr. Drukteinis ultimately concluded, after evaluating Mr. Etienne, reviewing Mr. Etienne's mental health and related records, and reviewing Mr. Etienne's conduct at the time of the alleged crime and after his arrest, that it is more likely than not Mr. Etienne was suffering from schizophrenia at the time of the alleged crime and thereafter. He concluded that Mr. Etienne's schizophrenia "contributed to paranoia about his attorneys, and his irrational and at time self-incriminating actions." Dr. Drukteinis opined that "a potential mental state issue should have been considered [by trial counsel], particularly with what appear to have been irrational behaviors and communications with his attorneys. A comprehensive psychiatric evaluation during that time period was clearly needed."

While the State's expert confirmed that Mr. Etienne suffered from schizophrenia and possibly a schizoaffective disorder, she could not definitively conclude that Mr. Etienne's symptoms were active and present at the time of the

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[6] Doc. 28: 8.
[7] Doc. 3-3: 93.
[8] *See* Doc. 3-12.

alleged crime and related trial.[9] The State's expert did, however, find that Mr. Etienne's early history is suggestive of an emerging mental illness in his teenage years.[10]

Yet, in the lead-up to, and during, trial, trial counsel lacked virtually any response or strategy in dealing with several significant pieces of the State's evidence. Most notably, Mr. Etienne exhibited self-destructive behavior and disconcerting judgment after his arrest, including paranoia about his trial lawyers. This paranoia contributed to Mr. Etienne sending seemingly inculpatory letters to the trial judge, several witnesses, the newspaper, and even the Governor of New Hampshire. These letters, and similarly self-incriminating jail phone calls, were admitted at trial and used against Mr. Etienne to establish his guilt.

Trial counsel testified that their failure to obtain Mr. Etienne's medical records was not a tactical decision.[11] Trial counsel further admitted that Mr. Etienne's post-arrest behavior—particularly the letters and phone calls—were "problematic," testifying that "I completely agree that this was a big problem for us; and, you know, [arguing that being in the jail 22 hours a day contributed to Mr. Etienne's behavior] was not a very effective way of dealing with it."[12] Trial counsel further explained:

> I mean, I think that you raise the point—sorry if I'm not directly responsive to your question; but I think we're headed there—which is, 'Hey. If you were aware of his mental-health issues,

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[9] *See* Doc. 3-15, at 7-9.
[10] Doc. 3-15, at 10.
[11] Doc. 3, at 15.
[12] *Id.*

> had gotten an evaluation, that may have been a way to address this problem,' maybe bring in an expert and say this person is such and such a condition; therefore, that's why he acted the way he did. I mean, I acknowledge that that is something that is—I don't know—would have been worth pursuing had we considered it. I don't have a memory of like considering it. And I think, with this one, it's more than a memory. I don't think we considered that. Whether it was because we weren't aware of the extent of his mental-health issues or whether it was because we decided—or that we didn't pursue it in our getting an expert, I agree that that was something that was certainly worth considering, since we didn't have any effective way of dealing with this problem.[13]

The evidence that trial counsel *should have* obtained, and which was readily available to them, would have explained Mr. Etienne's post-arrest self-destructive behavior and disconcerting judgment, including the letters and jail calls that were used against Mr. Etienne at trial. It would have established that Mr. Etienne's erratic behavior and seemingly inculpatory statements were the product of paranoia brought about by his mental health issues, including his as-of-then undiagnosed schizophrenia, not evidence of his guilt. Had the jury known about Mr. Etienne's decade-long mental health issues, including an involuntary commitment when Mr. Etienne was a teenager, they would have known that Mr. Etienne was not the swaggering gang leader portrayed by the State, but rather a young man in the early stages of a debilitating mental illness. If the jury had been presented with the uninvestigated evidence, they would have had evidence to counter the State's strongest evidence.

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[13] *Id.* at 16.

And if the State had known about Mr. Etienne's mental health history, it would have not only provided them with mitigating evidence, but it also would have exposed further weaknesses in the State's theory of guilt. If defense counsel had known about Mr. Etienne's mental health history, they could have consulted with a mental health expert, introduced evidence to counter the incriminating evidence of intent at trial, and presented mitigating evidence to the State in an attempt to plea bargain the case.

Trial counsels' failure to investigate Etienne's mental health history is contrary to clearly established Supreme Court precedent holding that a defense lawyer has a duty to investigate evidence that may rebut the case against their client. This same precedent holds that a defense lawyer has a duty to investigate the defendant's mental health history, disadvantaged background, and, when indicated, consult with a mental health expert about this evidence. This same precedent holds that trial counsel has a duty to investigate evidence that would have established that the defendant suffered from schizophrenia and other disorders. Trial counsels' errors are also contrary to Supreme Court precedent establishing that a defendant has the right to effective assistance of counsel regarding advice related to sentencing and plea bargaining. Counsels' errors were prejudicial to a degree that merits a new trial.

Where the First Circuit's denial of Mr. Etienne's certificate of appealability on his ineffective assistance of counsel claim is at odds with clearly established Supreme Court precedent, where the mental health-based issues in this case are of

increasing importance in ensuring just outcomes in criminal proceedings, and where the issue in this case is likely to recur, this Court should grant this Petition and allow the writ.

II. Factual and Procedural Background

A. Factual Background

In January 2004, Mr. Etienne lived in a second-floor apartment at 265 Central Street in Manchester, New Hampshire with his girlfriend, Cameo Jette, his friend, Israel Rivera, and Jette's friend, Jenna Battistelli.[14] Mr. Etienne's other friends included Louis Pierre, Jose Gomez, Michael Roux, and David Garcia.

On January 28, 2004, Mr. Etienne shot an acquaintance, Larry Lemieux, in the back of the head, and Lemieux died instantly.[15] Mr. Etienne's defense was that Lemieux was the aggressor and that the shooting was justified to prevent Lemieux from killing Louis Pierre.[16] *See* RSA 627:4 (II)(a). Several trial witnesses offered testimony consistent with this defense, including testimony that there was a loaded gun[17] in Lemieux's hand after he was shot and Pierre's testimony that Mr. Etienne "saved [his] life" by shooting Lemieux before Lemieux had a chance to kill Pierre.[18]

The State's case was based on the testimony of witnesses who lied to the police, tampered with evidence, had criminal records, and/or ran from the scene of

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[14] *Etienne*, 35 A.3d at 530; 163 N.H. at 65.
[15] Appx. 4.
[16] Doc. 28: 5.
[17] *Etienne*, 35 A.3d at 531, 163 N.H. at 67.
[18] Doc. 28: 2.

the shooting.[19] These witnesses gave conflicting testimony as to both the in-person confrontation between Mr. Etienne and Lemieux as well as the events leading up to that confrontation that were relevant to intent.[20]

While the New Hampshire Supreme Court acknowledged that "witness accounts differed"[21] as to what happened after Mr. Etienne and Lemieux confronted each other, witness accounts also differed on nearly every critical event in this case.[22] As the district court observed in Mr. Etienne's subsequent federal habeas petition, the New Hampshire Supreme Court found the following facts:

> Lemieux [the victim] arrived . . . and walked onto the porch with his hands in his pockets. He approached Pierre so they stood face to face, about six inches apart. . . . the defendant [Etienne] and [others] stood in the area behind Lemieux. Pierre's gun was in his waistband, and [Etienne's] gun was plainly visible in his hand . . . The witnesses all agreed that the defendant [Etienne] and Pierre spoke to each other in Haitian Creole, and then the defendant stepped behind Lemieux, raised his gun, and shot Lemieux in the head behind his right ear. Lemieux's hands were inside his jacket when he was shot. He died immediately.[23]

This factual summary does not include reference to the testimony of several witnesses who either saw Lemieux draw his gun[24] before he was shot or heard statements suggesting he was about to draw his weapon.[25] Even though Mr.

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[19] *See* Doc. 28: 1-2.
[20] Doc. 28: 1-4.
[21] *Etienne*, 35 A.3d at 531; 163 N.H. at 67.
[22] Doc. 28: 5-7, 23-24.
[23] Doc. 37, at 7.
[24] Doc. 28: 2.
[25] *Id.*

Etienne ran from the scene,[26] threw away his gun,[27] and lied to the police,[28] he did nothing different than most of the witnesses who made up the State's case.

Other evidence supporting Mr. Etienne's claim that he shot Lemieux to protect Pierre included testimony that Lemieux was feeling a "little edgy" as he drove to an expected confrontation with Pierre on January 28, 2004 and that Lemieux was "tired of [Pierre's] mouth."[29] Further, while some of the State's witnesses claimed Lemieux said he was only going to Central Street for a fist fight with Pierre, these claims were undermined by other witnesses who saw Lemieux with a gun shortly after he arrived at the Central Street address.[30] Not only did Pierre see Lemieux's gun, but he and other witnesses also knew that Lemieux regularly carried a gun.[31]

Pierre "knew the type of person he was dealing with" and armed himself with a gun when Lemieux told him he was heading to Pierre's location at Central Street.[32] Other witnesses testified that Lemieux was frequently under the influence of drugs or alcohol.[33] It was also known that Lemieux got into fights while he was drunk.[34]

Additional evidence supporting Mr. Etienne's defense that he shot Lemieux

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[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] Doc. 28: 5-6.
[30] Doc. 28: 5-7, 23-24.
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*

to defend Pierre included testimony that as soon as Lemieux arrived at 265 Central Street, he went onto the porch with his hands inside his jacket and walked with a gait, which one witness described as a "ghetto" walk that suggested he was carrying a weapon.[35] There was also testimony that Lemieux immediately started arguing with Pierre.[36] Lemieux started screaming at Pierre, saying that he was "tired of your shit."[37] Garcia heard someone other than Lemieux say, "Why you reaching?"[38] One of the witnesses heard Lemieux say to Pierre, "Fuck it. We can just shoot it out."[39] Pierre's fears that Lemieux came to Central Street armed were confirmed when Lemieux pulled out his gun and pointed it at Pierre.[40] Even though Pierre had a gun tucked inside his pants, he did not reach for it because he feared Lemieux "would kill me quicker."[41] Pierre then watched as Lemieux fell to the ground after Mr. Etienne shot him behind the ear.[42] Pierre would later explain that Mr. Etienne saved his life when he shot Lemieux.[43]

To counter Mr. Etienne's defense, the prosecution relied on the testimony of Jose Gomez who claimed that prior to the shooting, Mr. Etienne said, "it's a wrap," and that Mr. Etienne said he was going to "merk" Lemieux, meaning Mr. Etienne

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[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.*

was going to kill Lemieux.[44] To establish motive for Mr. Etienne to shoot Lemieux, the State presented evidence that on the way to Central Street, Lemieux and Pierre had been arguing by phone over the fact that, on the previous evening, Lemieux attempted to sexually assault Jennifer Hannaford, the mother of Pierre's children.[45]

In addition to the above-mentioned witnesses, the State also presented inculpatory letters written by Mr. Etienne to witnesses, the local newspaper,[46] the court,[47] and the Governor[48] about his case.[49] The letters, among other things—including that they "contain references from which a jury could infer [Mr. Etienne] was threatening or attempting to coerce witnesses in the case"—included paranoid and suspect material, such as an accusation that Manchester Police were bribing "people by offering large sums of money to plant drugs on me or wound me." *See* Doc. 3-1, at 3-5. The New Hampshire Supreme Court outlined the content of some of these letters in its decision on Mr. Etienne's direct appeal, later relying in part on them in finding that there was sufficient evidence to convict Mr. Etienne despite the claim that the State had failed to disclose certain exculpatory evidence. *See State v. Etienne*, 163 N.H. 57, 67-69, 93-95 (2011). For example, the court summarized a letter Mr. Etienne sent to one witness in which he first "insisted that he was not involved with the murder, but later asserted that he shot Lemieux in defense of

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[44] *Id.*
[45] *Id.*
[46] Doc. 3-2:4.
[47] Doc. 3-2:31.
[48] Doc. 3-2:24.
[49] Doc. 3-2:3-5.

himself and Pierre." *Id.* at 68. He again claimed in another letter that he was not there, and in various letters blamed various other people for Lemieux's death. *Id.* He later wrote to a witness that "the person who killed Lemieux had been 'justified' in shooting him" and then wrote to the Governor and a judge, this time claiming that *he* had shot Lemieux but that it was self-defense. *Id.* at 69.

B. Procedural Background

Mr. Etienne's defense of self-defense and defense of another was unsuccessful.[50] Following his conviction, Mr. Etienne learned that the State withheld impeachment evidence regarding Jose Gomez, the key State witness who undermined Mr. Etienne's defense theory. Specifically, the suppressed evidence was a "proffer letter" that recommended that Gomez receive a suspended sentence on his drug charges because of his "attempts to cooperate with the State."[51] As Gomez specifically denied receiving any consideration for his cooperation with the State during his trial testimony, Mr. Etienne filed a motion for a new trial alleging a material *Brady* violation.[52] The trial court denied this motion,[53] and Mr. Etienne appealed this decision to the New Hampshire Supreme Court as part of his direct appeal.

On direct appeal, the New Hampshire Supreme Court found that Mr. Etienne satisfied the first prong of the *Brady*[54] test, as defense counsel cross-examined

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[50] *Etienne,* 35 A.3d at 533; 163 N.H. at 69.
[51] Doc. 28: 22.
[52] *Etienne,* 135 A. 3d at 533; 63 N.H. at 69.
[53] *Id.*
[54] *See Brady v. Maryland,* 373 U.S. 83, 87 (1963).

Gomez extensively about his claim that he received no consideration for his pending drug charges in exchange for his testimony against Mr. Etienne.[55] The New Hampshire Supreme Court also found that Mr. Etienne satisfied the second prong of *Brady*, as the suppressed evidence was imputed to the State.[56] The New Hampshire Supreme Court affirmed Mr. Etienne's conviction, however, because it found that the suppressed evidence would not have altered the defense strategy or the outcome, as there was overwhelming additional evidence of premeditation before the jury.[57] It relied, in part, on Mr. Etienne's letters and conduct after the shooting in upholding the convictions for sufficient evidence notwithstanding the withheld *Brady* evidence.[58]

After losing his direct appeal, Mr. Etienne filed a *pro se* motion in state court requesting a new trial, which the Merrimack County Superior Court treated as a petition for writ of habeas corpus.[59] The trial court appointed counsel to represent Mr. Etienne, and post-direct appeal counsel discovered significant mental health records.[60] Mr. Etienne then consulted with an expert psychiatrist who found that Mr. Etienne was likely suffering from undiagnosed and untreated paranoid schizophrenia before and during his murder trial.[61] Counsel thereafter filed an

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[55] *Id.*, 35 A.3d at 548; 163 N.H. at 89.
[56] *Id.*, 35 A.3d at 550; 163 N.H. at. 91.
[57] *Id.*, 35 A.3d at 550; 163 N.H. at 91.
[58] *Id.*, 35 A.3d at 552; 163 N.H. at 93.
[59] Doc. 3-1: 7
[60] Doc. 5-1: 24.
[61] Doc. 3-1: 7

amended pleading that included the claims that were ultimately presented before the federal district court.[62]

After a three-day hearing that included testimony from trial counsel and two expert psychiatrists, the state trial court denied Mr. Etienne's habeas petition on January 24, 2018.[63] Mr. Etienne filed a timely discretionary appeal of the state court habeas decision, and the New Hampshire Supreme Court declined to accept the appeal.[64]

On December 13, 2018, Mr. Etienne filed a habeas petition pursuant to 28 U.S.C. § 2254 in the United States District Court for the District of New Hampshire.[65] Mr. Etienne filed an amended petition on May 18, 2020.[66]

The district court (McAuliffe, J.) issued an order denying relief as to all claims and, accordingly, entered a judgment for the Respondent.[67] On December 2, 2020, the First Circuit Court of Appeals ordered that Mr. Etienne file a motion for certificate of appealability ("COA") on or before January 4, 2021.

On April 20, 2023, the First Circuit, in part, denied Mr. Etienne's request for a COA on his ineffective assistance of counsel claim.[68]

C. The District Court's Analysis and Rulings

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[62] *Id.* at 9-17; 21-23; 29-31.
[63] Doc. 3-5.
[64] Doc. 3-6.
[65] Doc. 3.
[66] Doc. 28.
[67] Doc. 37; Appx. B.
[68] Appx. A.

Mr. Etienne raised two issues before the district court,[69] only one of which is relevant to this Petition[70]: whether he was denied effective assistance of counsel when trial counsel failed to investigate his mental health records.

The district court rejected both claims on the merits. As to the ineffective assistance of counsel claim, the district court reasoned as follows:

> The state habeas court properly recognized that, "the question is not whether the defense could have found some evidence to support an argument that the petitioner was mentally ill, but rather whether, given what was before the lawyers, a reasonably competent lawyer would have pursued the evidence based on the totality of what was known and the viable defenses." *Id.* at 24. The court answered that question in the negative. That conclusion, which is amply supported by the record and consistent with Supreme Court precedent, is fatal to Etienne's ineffective assistance claim. *See*, e.g., *Knight v. Spencer*, 447 F.3d 6, 15 (1st Cir. 2006) ("It is only where, given the facts known at the time, counsel's choice was so patently unreasonable that no competent attorney would have made it, that the ineffective assistance prong is satisfied.")(emphasis supplied; citation and internal punctuation omitted). For that reason, Claim 1 of his petition fails.[71]

The district court also found that even if trial counsel had erred in failing to obtain the mental health records, Mr. Etienne was not prejudiced by any claimed error.[72]

D. The First Circuit's Analysis and Ruling

In a brief Judgment, the First Circuit denied Mr. Etienne's request for a COA on his ineffective assistance of counsel claim. Appx. A. The court stated that "any

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[69] Appx. 13.
[70] The First Circuit granted a COA on Mr. Etienne's *Brady* claim, remanding to the district court for further proceedings. Appx. A.
[71] Appx. 22.
[72] Appx. 23.

evidence of mental illness at the time of the shooting or in the period thereafter would not have been strong: the State's expert witness opined that the petitioner . . . had not been suffering from schizophrenia in 2004; and while Etienne's expert witness was of the opposite view, the state court found the State's expert more persuasive." *Id.* It should be noted here that this is not a complete characterization of the State's expert's opinions. Specifically, while the State's expert could not definitively find that Mr. Etienne was suffering from mental illness at the time of his trial ("I am not able to definitively conclude whether or not [symptoms of a psychiatric illness] were active and present at that time"), it was simply because she did not believe there was contemporaneous evidence sufficient to so conclude; she did not rule out that, as Mr. Etienne's expert found, Mr. Etienne was suffering from schizophrenia at that time.[73]

The First Circuit also concluded that the state court's finding that "any evidence of mental illness, if presented, would have undermined the petitioner's claim of self-defense or defense of another" was not unreasonable. Appx. A. Accordingly, the First Circuit denied Mr. Etienne's request for a COA on his ineffective assistance of counsel claim. *Id.*

REASONS FOR GRANTING THE PETITION

I. The First Circuit's Decision is Contrary to Clearly Established Supreme Court Precedent

[73] *See* Doc. 3-15, at 7-9.

Under the AEDPA, no appeal from a district court's final order in a habeas case may be taken unless the district court or the court of appeals issues a COA. 28 U.S.C. § 2253(c)(1). A COA should be issued upon "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To obtain a COA, a prisoner must "demonstrat[e] 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." *Banks v. Dretke*, 540 U.S. 668, 705 (2004) (quoting *Miller–El v. Cockrell,* 537 U.S. 322, 327 (2003)).

A COA is "not the occasion for a ruling on the merit of [a] petitioner's claim . . ." *Miller-El v. Cockrell*, 537 U.S. 322, 331 (2003). What is required, rather, is "an overview of the claims in the habeas petition and a general assessment of their merits." *Id.* at 336.

To prevail on his claim of ineffective assistance of counsel, Mr. Etienne must establish two elements: First, he must show that counsels' performance was deficient; second, he must show that the deficient performance prejudiced the defense. *Strickland v. Washington,* 466 U.S. 668, 687 (1984). As to prejudice, Mr. Etienne only has to show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" or that confidence in the outcome is undermined. *See Wiggins,* 539 U.S. at 534. The district court correctly summarized Mr. Etienne's ineffective assistance of counsel claim as follows:

> In the first of his two claims, Etienne focuses on his schizophrenia diagnosis – made more than ten years after the murder trial – and says his attorneys were ineffective for having neglected to investigate his mental health records and for failing to "discover" his mental illness. He adds that if counsel had obtained such information, they could have used it: (a) to explain to the jury his inculpatory post-shooting conduct (i.e., flight from the scene; disposal of the murder weapon; lies to the police; and a series of letters written from jail that undermined his claims of self-defense); and/or (b) to negotiate a favorable plea agreement with the State.[74]

A. Deficient Performance

The lower courts' analyses of the first prong of the *Strickland* test mirrored the state court's factual findings, including that: (1) trial counsel, who had a long-term relationship with Mr. Etienne, saw no evidence that Mr. Etienne was experiencing symptoms of schizophrenia during the period leading up to his trial;[75] (2) the Faulkner Hospital admission was many years prior to the trial and appeared to have been related to the death of Mr. Etienne's father;[76] (3) the Faulkner Hospital records may have been more harmful than helpful to Mr. Etienne;[77] (4) Mr. Etienne had a trial in a different case after the trial on the murder charge and no mental health issues were raised by counsel in that case;[78] and (5) the trial court credited the testimony of the State's expert over that of the defendant's expert.[79]

This case presents factual circumstances similar to those presented in *Abdul-Salaam*, which involved much of the same inadequately investigated information, including the defendant's difficult upbringing, childhood abuse, previous psychiatric

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[74] Appx. 15.
[75] Appx. 19-21.
[76] Appx. 18-20.
[77] Appx. 18-20.
[78] Appx. 19-20.
[79] Appx. 21.

experience, juvenile criminal activity, paranoia, a diagnosis of ADHD, and schizophrenic tendencies.[80] *See Abdul-Salaam*, 895 F. 3d 254, 250-262 (2018). The defendant's counsel in *Abdul-Salaam* actually presented some of the information mentioned above, whereas trial counsel in Mr. Etienne's case did not do any social history investigation.[81]

There are additional similarities between *Abdul-Salaam* and this case. For instance, just like in *Abdul-Salaam*, the State's expert in Mr. Etienne's case, Dr. Fife, disagreed with the defense's expert, opining that Mr. Etienne's illness did not definitively interfere with his judgment or cause his irrational behavior.[82] One of Mr. Etienne's attorneys, just like the attorneys in *Abdul-Salaam*, said he did not detect mental health issues and believed that there would be a dangerous side to presenting mental health evidence to the jury.[83] Neither of these considerations were relevant, according to the *Abdul-Salaam* court, or impacted the court's decision that the defendant's trial counsel conducted an unreasonably limited investigation. *Id.* at 270.

As trial counsel testified, "I acknowledge that [Mr. Etienne's mental health] is something that is—I don't know—would have been worth pursuing had we considered it."[84] The First Circuit has also observed that evidence of a prior mental health hospitalization necessitates research into the defendant's medical

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[80] Doc. 3-12 at 1-2; 9; Doc. 3-7.
[81] Doc. 28: 13.
[82] Doc. 28: 13.
[83] Doc. 28: 13-14.
[84] Doc. 3-16: 101-102.

background, *see Genius v. Pepe*, 147 F.3d 64, 61 (1st Cir. 1998), and this Court has determined that other "red flags" relating to a defendant's mental wellbeing require an investigation, *see Andrus v. Texas*, 140 S.Ct. 1875, 1882-83 (2020).

As the state court's finding on this issue (and the subsequent adoption of that finding by the district court and First Circuit) is contrary to clearly established United States Supreme Court precedent, the lower courts erred in denying a COA. *See Andrus*, 140 S.Ct. 1875; *Porter*, 558 U.S. at 40; *Rompilla v. Beard,* 545 U.S. 374, 385 (2005); *Wiggins v. Smith*, 539 U.S. 510, 534 (2003); *Williams v. Taylor*, 529 U.S. 362, 395 (2000).

As this Court reasoned in its recent *Andrus* opinion:

> On top of that, counsel ignored pertinent avenues for investigation of which he should have been aware, and indeed was aware. At trial, counsel averred that his review did not reveal that Andrus had any mental-health issues. But materials prepared by a mitigation expert well before trial had pointed out that Andrus had been diagnosed with affective psychosis, a mental-health condition marked by symptoms such as depression, mood lability, and emotional dysregulation. At the habeas hearing, counsel admitted that he "recall[ed] noting," based on the mitigation expert's materials, that Andrus had been "diagnosed with this seemingly serious mental health issue." He also acknowledged that a clinical psychologist briefly retained to examine a limited sample of Andrus' files had informed him that Andrus may have schizophrenia. Clearly, the known evidence would have led a reasonable attorney to investigate further. Yet counsel disregarded, rather than explored, the multiple red flags.
>
> In short, counsel performed virtually no investigation, either of the few witnesses he called during the case in mitigation, or of the many circumstances in Andrus' life that could have served as powerful mitigating evidence. The untapped body of mitigating evidence was, as the habeas hearing revealed, simply vast.

Andrus, 140 S.Ct. at 1882-83 (quotations, internal citations, and punctuation omitted).

The lower courts also erred in relying on the state court's finding that "trial counsel were not actually aware of any potential mental health issues."[85] This finding is contrary to the record, as defense counsel "admitted that he was aware, from his representation of Etienne on a previous criminal charge, that Etienne had a significant history of mental health issues, significant childhood trauma and had been committed to a mental health facility in 1995 for attempted suicide."[86] Further, discovery provided by the State also put trial counsel on notice that Mr. Etienne had made a suicide attempt in jail while awaiting trial.[87]

The lower courts made the same error as the state trial court when they looked at each piece of evidence in isolation and failed to look at the totality of evidence in making their determinations as to whether trial counsel were ineffective. *See Strickland v. Washington*, 466 U.S. 668, 695 (1984) ("In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury.").

Accordingly, the caselaw supports a finding of deficient performance. So too do the American Bar Association Criminal Justice Standards on Mental Health. *See, e.g.*, ABA Criminal Justice Standards on Mental Health, § 7-1.4 (2016),

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[85] Appx. 19.
[86] Doc. 28: 7 (citing Doc. 3: 7).
[87] Doc. 3-1: at ¶ 10 &16.

available at chrome-

www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/mental_health_standards_2016.authcheckdam.pdf.[88] Those Standards state, among other things:

> Attorneys who represent defendants with mental disorders should explore all mental state questions that might be raised, including whether the client's capacities at the time of police interrogation bear on the admissibility or reliability of any incriminating statements that were made, whether the client is competent to proceed at any stage of the adjudication, and whether the defendant's mental state at the time of the offense might support a defense to the charge, a claim in mitigation of sentence, or a negotiated disposition.

Id.

As will become clear below, had Mr. Etienne's trial counsel followed this reasonable Standard, they would have unveiled "all mental state questions that might be raised," they would have been able to address the "admissibility or reliability of [the] incriminating statements that were made" by Mr. Etienne following the events at issue, they would have been able to explore "whether the defendant's mental state at the time of the offense might support a defense to the charge," they would be been able to present mitigation evidence at sentencing, and they would have been able to present mitigation evidence in the course of a negotiated disposition. Trial counsels' failure to so much as request and review Mr. Etienne's significant mental health records, or otherwise perform an adequate and

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[88] "Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determine what is reasonable . . .." *Strickland*, 466 U.S. at 688.

necessary investigation as to Mr. Etienne's mental health, foreclosed all these avenues and resulted in the deprivation of Mr. Etienne's liberty until the day he passes.

B. *Strickland* - Prejudice Prong

i. The Uninvestigated Exculpatory Evidence Would Have Upended the State's Portrayal of Mr. Etienne as a Gun-Toting Street Criminal and Gang Leader and Would Have Effectively Countered Inculpatory Post-Arrest Conduct Relied Upon by the State to Establish Guilt

The lower courts also erred in their finding as to the prejudice prong of the *Strickland* test. Mr. Etienne, who is African-American, was portrayed at trial as a gun toting gang leader who hung out with criminals and went by the "street name" of "D."[89] The State was able to weave Mr. Etienne's post-arrest conduct into their theory, which portrayed Mr. Etienne as a menacing thug who pre-meditated the murder of Lemieux.[90] Evidence of Mr. Etienne's history of mental health issues would not only have countered this extremely prejudicial narrative, but it also would have offered a credible defense to the State's claims that his actions were pre-meditated and manipulative.

The totality of the evidence—consideration of which, both that adduced at trial and that adduced in the habeas proceeding, is proper—demonstrates that there is a reasonable probability that a different outcome would have resulted had trial counsel obtained and examined Mr. Etienne's relevant records and obtained an expert to evaluate his mental illness. Specifically, the evidence missed by trial

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[89] Doc. 3-1: 27

[90] Doc. 28: 13.

counsel would have provided them with a non-inculpatory reason for Mr. Etienne's post-shooting behavior, which the State described as the central aspect of its case and which one of Mr. Etienne's trial attorneys described as "a big problem for us," for which their developed theory "was not [] very effective."[91]

As just one example, trial counsel could have argued that Mr. Etienne's schizophrenia caused him to be paranoid with respect to the police; while he knew he acted in self-defense and defense of others, he believed he would be "set up" and felt he had to act (in a clearly irrational way) to combat what he believed was an effort to frame him for murder and other crimes. Further, the mere fact that Mr. Etienne was exhibiting significant paranoia and irrational behavior casts doubt upon the reliability of the statements he made in the subject letters and phone calls. *See, e.g.*, ABA Criminal Justice Standards on Mental Health, § 7-1.4 (stated that defense attorneys should "explore all mental state questions that might be raised, including . . . whether the client's capacities . . . bear on the admissibility or reliability of any incriminating statements that were made").

Indeed, the New Hampshire Supreme Court used the precise evidence that was a "big problem" for trial counsel—and for which they had no "effective" response having failed to investigate Mr. Etienne's mental health records—to find that, while the State committed a *Brady* violation, there was nevertheless overwhelming evidence to support the conviction. *See Etienne*, 25 A.3d 523, 550-53, 163 N.H. 57, 92-95. The court specifically considered "the circumstances of the

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[91] Doc. 3-16: 100-01.

homicide, and [] the defendant's actions thereafter," and expressly relied in part on the "letters the defendant had written" in finding overwhelming evidence of guilt such that the undisclosed *Brady* evidence did not warrant a new trial. *Id.* Had the defense investigated Mr. Etienne's mental health records, they would have been able to explain why Mr. Etienne's "actions []after" the shooting and the "letters the defendant had written" were not inculpatory in light of Mr. Etienne's mental illness. That evidence, therefore, would not have been sufficient evidence of guilt, and the nature of the evidence of guilt at trial would not have been "overwhelming." Accordingly, the fact that trial counsel pursued a self-defense theory does not impact the materiality of the mental health evidence or excuse trial counsels' failure to investigate it, where the very evidence that they would have been able to rebut based on Mr. Etienne's mental health was considered by the New Hampshire Supreme Court to make up, in part, "overwhelming evidence of guilt."

More broadly, this Court has indicated that mental illness is not only relevant mitigation evidence, but it is also powerful evidence diminishing a criminal defendant's culpability. *See Atkins v. Virginia*, 536 U.S. 304, 304-05 (2002) (noting that "today society views mentally retarded offenders as categorically less culpable than the average prisoner"). This Court has clearly held that evidence of mental illness and substance abuse is relevant to assessing moral culpability. *See also Rompilla*, 545 U.S. at 393; *Porter*, 558 U.S. at 43-44. Like in *Rompilla*, had trial counsel presented evidence relating to mental illness, it not only would have rebutted the evidence suggesting that Mr. Etienne made inculpatory statements

and engaged in inculpatory behavior, but it also would have influenced the jury's evaluation of Mr. Etienne's moral culpability. *See Rompilla*, 545 U.S. at 392-93 (finding that the "undiscovered" evidence relating to the defendant's mental health, including evidence that the defendant's mental impairments related back to his childhood, "might well have influenced the jury's appraisal of Rompilla's culpability" (quotations and punctuation omitted)).

Finally, the reasoning of the lower, and state, courts—that the State's expert did not believe Mr. Etienne was suffering from schizophrenia at the time of his trial and that the state court found the State's expert more credible than Mr. Etienne's expert, who opined that Mr. Etienne *was* suffering from schizophrenia at the time of trial—is faulty both because (1) the State's expert did not definitively find that Mr. Etienne was not suffering from schizophrenia at the time of his trial, and only suggested that she could not reach that conclusion based upon the available evidence; and (2) as outlined above, there was patent evidence of severe mental impairment, irrational behavior, and paranoid thinking which was known to trial counsel throughout their representation of Mr. Etienne.

ii. The Uninvestigated Exculpatory Evidence Would Have Availed Trial Counsel of an Alternative Defense Theory Based on Mental Health

Even if the evidence trial counsel would have obtained had they investigated Mr. Etienne's mental health records does not give rise to a reasonable probability of a different outcome based upon trial counsels' chosen defense of self-defense, and even if Mr. Etienne's mental illness would not have given rise to a competency issue, trial counsels' failure to investigate deprived them of the opportunity to

explore, and possibly present, an alternative mental health-based defense. "Clearly failure to investigate a possible defense can amount to ineffective assistance of counsel." *United States ex rel. Rivera v. Franzen*, 794 F.2d 314, 316 (7th Cir. 1986) (citations omitted). "Where the record establishes that counsel had reason to know, from an objective standpoint, that a possible defense, such as insanity, is available, failure to investigate fully can constitute ineffective assistance of counsel." *Id.*; *see also Mauldin v. Wainwright*, 723 F.2d 799 (11th Cir.1984); *Beavers v. Balkrom*, 636 F.2d 114 (5th Cir.1981); *Davis v. Alabama*, 596 F.2d 1214 (5th Cir.1979), *vacated as moot*, 446 U.S. 903, 100 S.Ct. 1827, 64 L.Ed.2d 256 (1980); *see also* ABA Criminal Justice Standards on Mental Health, § 7-1.4 (indicating that defense attorneys should investigate mental health issues to determine "whether the defendant's mental state at the time of the offense might support a defense to the charge").

iii. The Uninvestigated Exculpatory Evidence Would Have Materially Aided Both the Plea and Sentencing Process

Another aspect of Mr. Etienne's *Strickland* claim was that his trial counsels' duty to investigate his mental health history included a duty to investigate evidence that may be relevant to the plea and sentencing process. *See Rompilla*, 545 U.S. 374; *see also* ABA Criminal Justice Standards on Mental Health, § 7-1.4 (indicating that defense attorneys should investigate mental health issues to determine whether "the defendant's mental state . . . might support . . . a claim in mitigation of sentence, or a negotiated disposition").

In rejecting Mr. Etienne's claim that trial counsel were ineffective as to plea bargaining, the state court's order incorrectly placed the blame at the feet of the

petitioner, asserting that "... Etienne never authorized his lawyers to negotiate a plea bargain or expressed a desire to accept one..."[92] This finding is an unreasonable determination of the facts for two reasons. First, this finding ignores evidence that on February 23, 2004, Mr. Etienne wrote a letter to his lawyers directing them to set up a meeting with the prosecutor for him to provide information to them in the hopes of negotiating a favorable outcome.[93] Trial counsel never followed up on this request.[94]

Second, the state's court's finding that it believed that Mr. Etienne "never" wanted a plea bargain because "there was a reasonable chance at freedom"[95] is directly inconsistent with the New Hampshire Supreme Court's assessment that the evidence against Mr. Etienne was "overwhelming." *Etienne,* 135 A.3d at 546; 163 N.H. at 86.

Mr. Etienne's psychiatric records, aside from his prior psychiatric hospitalization, included information that he was hearing voices, smearing feces on the wall of his cell, and tying his pants around his neck in a suicide attempt. These records would have created a significant contrast to how the State viewed Mr. Etienne at the time of trial. In their closing, the State referred to Mr. Etienne as living in a different "world" and living "by a different set of rules."[96] The State referred to Mr. Etienne as "manipulative" and a person who does not tolerate

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[92] Doc. 3-5: 36.
[93] Doc. 28: 18; Doc. 3-9: 181.
[94] Doc. 28: 18.
[95] Doc. 3-5: 34-35.
[96] Doc. 28: 20.

challenges to his "authority."[97] These records would have provided a significant, mitigating contrast to how the State viewed Mr. Etienne prior to trial, particularly when coupled with Mr. Etienne's turbulent and traumatic upbringing. *See Porter*, 558 U.S. at 41 ("The judge and jury at Porter's original sentencing heard almost nothing that would humanize Porter or allow them to accurately gauge his moral culpability . . . Evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background may be less culpable." (quotations and punctuation omitted)).

II. The Issue on Appeal—A Defendant's Significant Mental Illness and its Relationship to the Alleged Crime and Evidence Introduced at Trial—is an Issue of Growing National Importance and One That is Likely to Recur

In the last couple of decades, the issue of a defendant's mental health and how it impacts criminal proceedings generally, and culpability specifically, has been the topic of significant discussion, caselaw development, and revolutionary advancements to the criminal justice system. *See generally* National Judicial Task Force to Examine State Courts' Response to Mental Illness (Rev. Feb. 2023), *available at* https://www.ncsc.org/__data/assets/pdf_file/0031/84469/MHTF_State_Courts_Leading_Change.pdf.

[97] *Id.*

As outlined above, this Court has issued a run of recent opinions emphasizing the materiality of a defendant's mental health and/or mental illness with respect to criminal charges and criminal trials. This Court has also recently extended a comprehensive array of protections to people with mental disorders. *See Atkins*, 563 U.S. 304 (ruling that executing people with intellectual disabilities violates the Eighth Amendment's ban on cruel and unusual punishments); *Hall v. Florida*, 572 U.S. 701 (2014) (narrowing the discretion with which states can designate an individual convicted of murder as too intellectually incapacitated to be executed); *Olmsted v. LC*, 527 U.S. 581 (1999) (establishing that people with disabilities have a qualified right to receive state-funded supports and services in the community rather than institutions).

Further, "the exoneration of wrongfully convicted persons has exposed that many individuals with mental disorders had given false confessions. Many jurisdictions have fashioned mental health courts and other problem-solving courts that divert people with mental disorders out of the criminal justice system. Police and sheriff departments have implemented Crisis Intervention Training (CIT) programs that teach first responders about techniques such as de-escalation." Drogin, Eric, et al., *The ABA Criminal Justice Standards on Mental Health*, 35-WTR Crim. Just. 16, 17 (2021); *see also* Harbison, Meredith, *Emerging Mental Health Courts: The Intersection of Mental Illness, Substance Use, Poverty, and Incarceration*, 60 Univ. Louisville L. Rev. 615 (2022). New Hampshire is one of the states that has implemented Mental Health Courts to address how an offender's

mental health diagnosis led to criminal behavior, "thereby reducing recidivism, and protecting public safety," as an alternative to jail time.[98]

Troublingly—and as further reason to develop jurisprudence regarding how to handle defendants with mental illnesses, as well as address a defendant's mental illness within the context of all stages of a criminal proceeding—United States prisons and jails are occupied by a disproportionate number of people who have a current or past mental health problem. *See Policies and Practices Surrounding Mental Health,* Prison Policy Initiative, *available at* https://www.prisonpolicy.org/research/mental_health/ (indicating that 43% of people in state prisons have been diagnosed with a mental disorder, 45% of federal prisoners have mental health or behavioral problems, and a majority of these individuals do not receive mental health care while incarcerated).

This Court, and others—as well as other members of the legal profession and mental health experts—have increasingly recognized the outsized role mental health plays at all phases of the criminal process: from the relationship between a defendant's mental health and the charged acts, to plea negotiations, to competency, to the development of a defense, to trial, and to sentencing. In some cases, a defendant's mental health is of such import that the defendant is diverted from the traditional process and transferred to a Mental Health Court. In short, mental health—and, in particular, a significant mental illness such as

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[98] *See Drug & Mental Health Courts*, New Hampshire Judicial Branch, *available at* https://www.courts.nh.gov/our-courts/drug-mental-health-courts

schizophrenia—has become increasingly material to the scope and disposition of criminal matters and of increasing sensitivity to prosecutors, defense attorneys, and judges. The fact that there has been an increasing focus on combatting the disproportionate imprisonment of people with mental health problems only reinforces the conclusion that this issue is of particular significance and will endure in the decades to come. Resolution of the issue in this case—namely, a defense attorney's responsibility to investigate issues involving a defendant's mental health and how it may impact a criminal proceeding—will be of great service to courts, prosecutors, and defense attorneys as they navigate this area of growing concern and complexity.

CONCLUSION

The standard for the issuance of a COA involves only a showing that the resolution of a constitutional issue is debatable among reasonable jurists, or that the issue deserves encouragement to proceed further. That standard has been met with respect to the claim of ineffective assistance of counsel raised in Mr. Etienne's habeas petition. Further, Mr. Etienne has made a substantial showing that he was denied a constitutional right, specifically the right to effective assistance of counsel. The First Circuit decided the important federal question in this case (in both its denial of the COA and its analysis of the merits of Mr. Etienne's ineffectiveness claim) in a way that conflicts with this Court's relevant decisions and sufficiently departs from the accepted and usual course of the relevant judicial proceedings as to call for the exercise of this Court's supervisory powers. For these, and the

foregoing, reasons, Mr. Etienne respectfully requests that this Court grant his Petition and allow the writ.

Dated this 19th day of July, 2023.

Respectfully submitted,

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