

No. _____

IN THE
Supreme Court of the United States

JOHN MULLARKEY, JR., PETITIONER,

v.

SUPERINTENDENT HUNTINGDON
SCI, ET AL., RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Third Circuit erred in denying Petitioner's request for a certificate of appealability pursuant to 28 U.S.C. § 2253(c), where the Petitioner demonstrated, in accordance with the standards set forth in *Miller-El v. Cockrell*, 537 U.S. 322 (2003) and *Buck v. Davis*, 137 S. Ct. 759 (2017), that jurists of reason could disagree with the District Court's resolution of his constitutional claims or that jurists could conclude the issues presented were adequate to deserve encouragement to proceed further?

PARTIES TO THE PROCEEDINGS

John Mullarkey Jr., Petitioner

Superintendent Huntingdon SCI,
District Attorney Allegheny County, and
Attorney General Pennsylvania, Respondents

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PETITION FOR WRIT OF CERTIORARI

Petitioner John Mullarkey respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit (“Court of Appeals”).

OPINION BELOW

On September 5, 2017, the United States District Court for the Western District of Pennsylvania (“District Court”) denied John Mullarkey’s habeas corpus petition under 28 U.S.C. § 2254. *See* 2017 WL 3873620 (W.D. Pa. Sept. 5, 2017) and attached as Appendix (“App.”) B. On January 19, 2018, a panel of the Court of Appeals (“Panel”) denied Mr. Mullarkey’s application for a certificate of appealability. *See* 2018 WL 1632990 (3d Cir., Jan. 19, 2018) and App. A. On February 22, 2018, the Court of Appeals denied Mr. Mullarkey’s petition for rehearing by the Panel and the Court *en banc*. *See* App. C. Therefore, it affirmed the District Court’s order denying Mr. Mullarkey’s ineffective assistance of counsel (“IAC”) claim.

JURISDICTION

This Court has jurisdiction of this petition to review the judgment of the Court of Appeals pursuant to 28 U.S.C. §1254. This petition is timely submitted. The Court of Appeals’ denial of Mr. Mullarkey’s application for a certification of appealability was entered on January 19, 2018, and Mr. Mullarkey’s Petition for Rehearing and Rehearing *en banc* was denied on February 22, 2018.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves a state criminal defendant's constitutional rights under the Fifth and Sixth Amendment.

The Sixth Amendment provides in relevant part:

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

The Fifth Amendment provides in relevant part:

No person . . . shall be compelled in any criminal case to be a witness against himself.

This case also involves the application of 28 U.S.C. § 2253(c), which states:

(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;

(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.

STATEMENT OF THE CASE

A. Original Jurisdiction

Jurisdiction in the District Court was pursuant to 28 U.S.C. § 2255. Jurisdiction in the Court of Appeals was pursuant to 28 U.S.C. § 1291 and 28 U.S.C. § 2253.

B. Facts and Proceedings Below

On August 15, 2007, Ms. Demi Cuccia (“Ms. Cuccia”) was found outside her home with multiple stab wounds inflicted by Mr. Mullarkey. *See* App B. Thereafter, Mr. Mullarkey was seen exiting the home with severe self-inflicted injuries. *Id.* In an attempt to commit suicide, Mr. Mullarkey had slit his throat from ear to ear and stabbed himself four to five times directly in the neck. Mr. Mullarkey was 18 years old at the time and had no prior criminal history.

The District Court set forth the following factual background:

Police, paramedics, and EMT's [sic] arrived shortly thereafter. Initially, Appellant's injuries were considered more serious and police directed the first paramedics to arrive on the scene to treat him first. Appellant was rushed to a hospital where his life was saved. The second paramedic to arrive immediately began life saving measures on the victim; despite these efforts, the victim died [due to a severed artery in her left arm]

While under armed guard at the hospital, Appellant's ability to communicate was initially limited to writing statements on a dry erase board. At one juncture, Appellant questioned the officer guarding him whether a person could still be found guilty if that person did something wrong when he was on medication that made that person do it. Appellant added that he had been taking Accutane, a prescription medication designed to combat severe acne, which he alleged caused suicidal thoughts and violent outbursts. In addition, Appellant indicated to the officer that he stabbed the victim two or three times, not sixteen as reported.

The Commonwealth charged Appellant with criminal homicide. Appellant proceeded to a jury trial, asserting as a defense diminished capacity. In support of his position, he contended that his use of the prescription drug Accutane caused uncontrollable and aggressive actions. Both Appellant and the Commonwealth called expert witnesses. The expert testimony largely consisted of a discussion of Appellant's depression and whether Accutane could have caused him to stab the victim sixteen times. At the close of the evidence, but prior to the jury receiving its instructions, the manufacturer of Accutane removed it from the market. Appellant requested the trial court to

either instruct the jury on this action, permit him a continuance to investigate, or declare a mistrial. The court denied these requests and the jury returned a guilty verdict and Appellant received the mandatory sentence of life imprisonment.

Id. (quoting *Commonwealth v. Mullarkey*, 32 A.3d 828 (Pa. Super 2011) (unpublished memorandum, at 1-4).

Mr. Mullarkey was charged with criminal homicide for the death Ms. Cuccia in the Court of Common Pleas of Allegheny County, Pennsylvania (18 Pa. C.S. § 2501). (Case No. CP-02-CR-0013073-2007). On June 29, 2009, a jury convicted Mr. Mullarkey of first degree murder, and he received a life sentence without parole.

Through trial counsel, Robert Stewart, Esquire, Mr. Mullarkey filed a direct appeal to the Pennsylvania Superior Court (“Superior Court”) – the principal intermediate appellate court of the Commonwealth. On August 11, 2011, the Superior Court affirmed the judgment of sentence, and allowance of appeal was denied by the Supreme Court of Pennsylvania on February 15, 2012. *See* App. B. Mr. Mullarkey then filed a Post-Conviction Relief Act (“PCRA”) petition claiming ineffective assistance of counsel which was denied without a hearing, and on November 16, 2015, the denial of his post-conviction petition relief was affirmed by the Superior Court. *Id.* Mr. Mullarkey filed a timely petition for allowance of the appeal to the Supreme Court of Pennsylvania, which again declined to hear Mr. Mullarkey’s case on August 3, 2016. *Id.*

Since the conclusion of his direct appeal, Mr.

Mullarkey has unsuccessfully attempted to use the collateral proceedings available to him to argue that his trial attorney was ineffective for failing to seek suppression of the statements he gave the detective and failing to present an appropriate expert witness.

Mr. Mullarkey filed a Petition for Writ of Habeas Corpus in the United States District Court of the Western District of Pennsylvania seeking relief pursuant to 28 U.S.C. § 2254. The Honorable Robert C. Mitchell, United States Magistrate Judge (“Judge Mitchell”) presided over the Habeas Proceedings. The Government filed an Answer to the Habeas Petition and Mr. Mullarkey’s Habeas Counsel — Mr. Bills and Ms. Frick—missed the deadline to file a Reply. Judge Mitchell granted multiple extensions of time because Habeas Counsel told the court that they had made contact with an expert who may have information vital to the proceedings. However, Habeas Counsel never filed a Reply and did not reach out to the prospective expert until after Judge Mitchell denied the Habeas Petition.

On September 5, 2017, Judge Mitchell denied Mr. Mullarkey’s 28 U.S.C. § 2254 Petition for Writ of Habeas Corpus, in which Mr. Mullarkey advanced the foregoing IAC claim. *See* App. B. Mr. Mullarkey appealed the denial of that petition and filed an application for a certificate of appealability (“COA”) with the Court of Appeals. On January 19, 2018, the Panel denied his COA request. *See* App. A. In denying the COA Request, the Panel stated:

[Mr. Mullarkey] has not made a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. §

2253(c)(2). Essentially for the reasons given by [Judge Mitchell], jurists of reason would not debate the District Court's decision to deny the petition. *See Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Id.

Mr. Mullarkey filed a petition for rehearing by the Panel and for *en banc* review, which the Court of Appeals denied on February 22, 2018. *See App. C.*

The Court of Appeals erred in concluding that Mr. Mullarkey did not meet the threshold showing required to grant a COA. Statements Mr. Mullarkey gave to Detective Michael Kuma, (i) after being charged with Ms. Cuccia's murder, (ii) when he had not received Miranda warnings and (iii) while he was in police custody, shackled to a hospital bed, were admitted against him at trial. Mr. Mullarkey's trial attorney, Robert Stewart, never sought to suppress those statements. Mr. Mullarkey's counsel also failed to call an expert who could have helped Mr. Mullarkey establish a voluntary intoxication defense.

The circumstances present a debatable issue as to whether Mr. Mullarkey's trial counsel provided effective assistance; therefore, the denial of Mr. Mullarkey's request for a COA conflicts with the standards for a COA to issue as set forth in *Miller-El v. Cockrell*, 537 U.S. 322 (2003) and *Buck v. Davis*, 137 S. Ct. 759 (2017). This warrants a reversal of the Court of Appeal's decision and a COA should thus issue as to Mr. Mullarkey's IAC claim, and he should be permitted to file an appeal on that issue. This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

The Court of Appeals' refusal to issue Mr. Mullarkey a COA, after he plainly met the standards set forth by *Miller-El* and *Buck* for the issue of a COA, is a compelling reason to grant this petition or to summarily reverse.

In order for Mr. Mullarkey to appeal the District Court's dismissal of his habeas petition, a circuit court must issue a COA. 28 § 2253(c)(1)(B). Courts may issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This showing includes a demonstration that "jurists of reason could disagree with the district court's resolution of [petitioner's] constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Buck*, 137 S. Ct. at 773-74.

Obtaining a certificate of appealability "does not require a showing that the appeal will succeed," and "a court of appeals should not decline the application merely because it believes the applicant will not demonstrate an entitlement to relief." *Welch v. United States*, 136 S. Ct. 1257, 1263-64 (2016) (quoting *Miller-El*, 527 U.S. at 337). The claim sought to be appealed must only be "debatable among jurists of reason," or different courts must be able to resolve the claims "in a different manner." *Miller-El*, 537 U.S. at 327.

Thus, Mr. Mullarkey should have been granted a certificate of appealability because a reasonable jurist could conclude that Mr. Mullarkey's trial

counsel, Mr. Stewart, provided ineffective counsel by not seeking to suppress Mr. Mullarkey's statements to the police on Fifth and Fourteen Amendment grounds and by failing to call an expert witness who could have helped establish a voluntary intoxication defense.

I. Certiorari should be granted because reasonable jurists could debate the District Court's conclusion regarding whether Mr. Mullarkey's trial counsel provided IAC by not seeking to suppress Mr. Mullarkey's statements to the police on Fifth and Fourteen Amendment grounds.

Mr. Mullarkey should have been granted a COA because, at minimum, it is debatable whether his trial counsel's performance was constitutionally deficient.

The Sixth Amendment right to counsel includes "the right to effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To demonstrate a violation of the right to effective counsel, petitioner must demonstrate that his counsel's performance was deficient and that he was prejudiced by the deficient performance. *Id.* at 687-88. Here, reasonable jurists could find that Mr. Mullarkey's counsel was deficient and that Mr. Mullarkey was prejudiced by the deficient performance because his counsel failed to file a motion to suppress statements made by Mr. Mullarkey to Detective Kuma while Mr. Mullarkey was in the hospital when the statements were made in violation of his Fifth and Fourteenth Amendment

rights to be free from compulsory self-incrimination.

The Fifth Amendment provides that “no person . . . shall be compelled in any criminal case to be a witness against himself.” That protection applies to individuals – like Mr. Mullarkey – facing criminal charges in a state court proceeding pursuant to the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1 (1964). This Court has established that “without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual’s will to resist and to compel him to speak where he would not otherwise do so freely.” *Miranda v. Arizona*, 384 U.S. 426, 467 (1966). Thus, “[I]n the context of ‘custodial interrogation’ certain procedural safeguards are necessary to protect a defendant’s Fifth and Fourteenth Amendment privilege against compulsory self-incrimination.” *Rhode Island v. Innis*, 446 U.S. 291, 297 (1980).

Specifically:

the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of [a] defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. Those safeguards include the now familiar *Miranda* warnings – namely, that [a] defendant be informed that he has the right to remain silent, that anything he says can be used against him

in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires – or their equivalent.

Id. (internal quotation marks and citations omitted).

These *Miranda* safeguards extend not only to questioning initiated by law enforcement officers, but also to “its functional equivalent.” *Id.* at 300-01. The “functional equivalent” of interrogation includes “**any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from [a] suspect.**” *Id.* at 301 (emphasis added); *Arizona v. Mauro*, 481 U.S. 520, 526-27 (1987). Notably, the “latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police.” *Innis*, 466 U.S. at 301.

In Mr. Mullarkey’s habeas petition, he argued that his trial counsel, Mr. Stewart, rendered IAC for failing to seek suppression of his statements to Detective Kuma – because (i) Mr. Mullarkey did not receive his *Miranda* warnings; (ii) he was in custody by virtue of being, among other things, shackled to his hospital bed and subjected to around-the-clock supervision by law enforcement; and (iii) his communications with Detective Kuma constituted interrogation. Concerning the latter, Mr. Mullarkey argued that the nature of his communications with Detective Kuma and the detective’s words and conduct were reasonably likely to elicit an

incriminating response.

The District Court rejected Mr. Mullarkey's IAC claim. App. B. Mr. Mullarkey appealed the denial of his petition, but the Court of Appeals similarly denied Mr. Mullarkey's COA request holding that "jurists of reason would not debate the District Court's decision to deny the petition." App. B. Thus, the Court of Appeals committed a clear error of judgment because jurists could disagree with the District Court's resolution or could conclude the issue presented is adequate to deserve encouragement to proceed further for at least two reasons.

First, it is debatable whether Mr. Mullarkey's communications with Detective Kuma were voluntary and not the product of words and conduct reasonably likely to elicit an incriminating response. Detective Kuma testified at trial that Mr. Mullarkey first initiated contact with him.¹ That, however, is not the test for whether police conduct is an interrogation. *See Mauro*, 481 U.S. at 529.

At the time of Mr. Mullarkey's interaction with Detective Kuma, Mr. Mullarkey was in police custody shackled to a hospital bed, recovering from extensive surgery. Mr. Mullarkey's family retained Attorney Stephen Begler to represent him. Mr. Begler and Mr. Mullarkey's family informed hospital staff (i.e. case worker) that Mr. Begler had been retained to represent Mr. Mullarkey and that any and all law enforcement officers were not to be permitted to communicate or to have contact with Mr. Mullarkey while he was in the hospital. Mr. Begler also left his

¹ Transcript of Proceedings (Jury Trial – Volume 1) at 265, *Commonwealth v. Mullarkey*, No. CP-02-CR-0013073-2007 (Court of Common Pleas of Allegheny County, June 23-29, 2009).

business card on the dry erase board next to Mr. Mullarkey's hospital bed to inform any law enforcement personnel of his representation.

On August 22, 2007, Detective Kuma was assigned guard duty from 4:00 pm to midnight. He was dressed in plainclothes and did not identify himself as an officer. Mr. Mullarkey, unable to speak due to the wounds on his neck, tapped on a dry erase board to gain Detective Kuma's attention and inquired about the nature of a preliminary hearing. *See* App. B. After this initial contact, Detective Kuma engaged with Mr. Mullarkey by addressing his questions and discussing the possibility of a medical defense.² After Mr. Mullarkey had asked for and received answers about the legal process and legal defenses, Mr. Mullarkey purportedly began making a series of statements about his medical history, use of Accutane, depression, belief that the media wrongly reported the facts of his case, and his relationship with Ms. Cuccia.³ Mr. Mullarkey informed Detective Kuma that "he enjoy[ed] [his] company and [that] he [was] scared."⁴ Detective Kuma – in response to Mr. Mullarkey's comments about the media's erroneous reporting – told Mr. Mullarkey that the media frequently makes mistakes.⁵ At no point did Detective Kuma make any comments about whether Mr. Mullarkey should talk to him or not.⁶ Mr. Mullarkey was also never provided with his *Miranda*

² *Id.* at 265-66.

³ *Id.* at 266-69.

⁴ *Id.* at 281.

⁵ Petition for Post-Conviction Collateral Relief at 91-92, *Commonwealth v. Mullarkey*, No. 2007-13073 (Court of Common Pleas of Allegheny County, November 1, 2016).

⁶ *Id.* at 90-91.

warnings.

The District Court held that “while Mullarkey was clearly in custody, there is also no doubt that he voluntarily initiated the exchange with the officer who never questioned him. Accordingly, these claims do not present a basis for relief under the Fifth Amendment.” *Id.* However, the District Court failed to properly consider the perceptions of Mr. Mullarkey and the intent of Detective Kuma. Detective Kuma should have known that the encounter with Mr. Mullarkey was reasonably likely to evoke incriminating responses. This is not a case where an officer accidentally overhears statements from a suspect, Detective Kuma was an active participant throughout the conversation. The above could reasonably be interpreted as Detective Kuma responding to a scared young man’s legal questions in an attempt to establish his expertise and authority on the topic, creating an atmosphere wherein Mr. Mullarkey would be comfortable, less scared, and thus reasonably likely to ask him further questions and make additional statements about his case. Detective Kuma conceded that Mr. Mullarkey was “trying to ask questions to understand his position as far as the legal process.” *Id.* Detective Kuma, knowing Mr. Mullarkey’s vulnerable state, extracted statements that Mr. Mullarkey likely would not have given in an unrestrained environment. *See Mauro*, 481 U.S. at 529-30.

Accordingly, a reasonable jurist could conclude that – while Mr. Mullarkey was not subject to express questioning by Detective Kuma based on the existing record – Mr. Mullarkey was, indeed, interrogated, making all but his initial questions about preliminary

hearings involuntary, because Detective Kuma's responses to Mr. Mullarkey's inquiries and his patient and non-judgmental reading of Mr. Mullarkey's comments were reasonably likely to elicit incriminating statements. Even if Detective Kuma engaged with Mr. Mullarkey without intending to obtain a response, the statements may still constitute interrogation as Detective Kuma should have known that his comments were likely to elicit a response. *Innis*, 466 U.S. at 292. Because a reasonable jurist could have resolved the question of whether Mr. Mullarkey was subject to custodial interrogation differently than Judge Mitchell, the Court of Appeals – in holding that jurists of reason would not debate the District Court's decision – erred. The Court of Appeals should have issued a COA on whether Judge Mitchell correctly denied Mr. Mullarkey's IAC claim concerning trial counsel's failure to seek suppression of his statements to Detective Kuma as being violative of Mr. Mullarkey's Fifth and Fourteenth Amendment rights against compulsory self-incrimination.

Second, a reasonable jurist could also conclude that the existing record did not justify resolution of the instant IAC claim without a hearing. Trial counsel never sought to suppress Mr. Mullarkey's statements to Detective Kuma. Accordingly, Judge Mitchell did not have a suppression hearing transcript dedicated to this IAC claim. The state trial court also did not hold a hearing during Mr. Mullarkey's PCRA proceedings. Therefore, there is no record specifically addressing the issue of whether Mr. Mullarkey was subject to custodial interrogation or its functional equivalent.

There have been no credibility determinations made about Detective Kuma's description of his interactions with Mr. Mullarkey, and there has been no hearing to address the issue. The state trial court's statements that Detective Kuma "asked no questions and simply responded to [Mr. Mullarkey's] questions" and that Mr. Mullarkey's statements were "unsolicited, spontaneous utterances" thus assume that Detective Kuma's testimony was truthful.⁷ The Superior Court's reliance on the trial court's statements is, therefore, based on the same assumption. However, no staff were present during the interaction, and there was no physical evidence of Mr. Mullarkey's purported statements.

Thus, Judge Mitchell's conclusions – relying on the Superior Court – that Detective Kuma did not ask Mr. Mullarkey any questions and that Mr. Mullarkey volunteered all of the information provided to Detective Kuma were flawed. Accordingly, a reasonable jurist could find that the existing record – lacking any hearing devoted to the instant IAC claim, any cross-examination of Detective Kuma designed to support the instant IAC claim, and any credibility determinations made after such a hearing and cross-examination – was insufficient to permit disposition of Mr. Mullarkey's claim and that a hearing in the District Court should have been held. *See* U.S.C. § 2254(e)(2). The Court of Appeals thus erred by denying the COA request, and a COA should issue permitting Mr. Mullarkey to appeal the propriety of

⁷ Order denying/dismissing Appellant's Petition for Post-Conviction Collateral Relief, *Commonwealth v. Mullarkey*, CP-02-CR-0013073-2007 (Court of Common Pleas of Allegheny County, September 4, 2014)

Judge Mitchell's rejection of this IAC claim without a hearing.

II. Certiorari should be granted because reasonable jurists could debate the District Court's conclusion regarding whether Mr. Mullarkey's trial counsel provided IAC by failing to call an expert witness who could have helped him establish a voluntary intoxication defense.

Reasonable jurists could debate whether trial counsel was ineffective for failing to present appropriate expert testimony regarding the severe psychological effects of Accutane, a prescription drug that has since been pulled from market. Mr. Mullarkey's trial counsel failed to call Dr. Fochtman⁸, an expert who could have helped to establish an Accutane-based voluntary intoxication defense.⁹ The District Court held that "even if Dr. Fochtman has been called to testify, he was unable to provide any demonstration that [Mr. Mullarkey's] sensibilities were "overwhelmed" by the use of Accutance, and for this reason counsel cannot be deemed to have been

⁸ Dr. Fochtman is chairman, Department of Pharmacology-Toxicology, Duquesne University, Pittsburgh, PA.

⁹ Dr. Fochtman's research speaks of the psychotic side effects related to Accutance including depression, aggression and suicidal ideation. In 2016, Fochtman wrote in a report that, "John Mullarkey's actions that led to the death of Demi Cuccia and his own suicide attempt ... are consistent with the documented side effects reports for [Accutane] therapy. In the absence of any other cause the side effects of his drug therapy would have contributed to his state of mind and resultant actions taken." App. B.

ineffective for failing to call him as a witness.” See App. B. Judge Mitchell interpreted Dr. Fochtman’s report – stating, “In the absence of any other cause the side effects of [Mr. Mullarkey’s] drug therapy would have contributed to his state of mind and resultant actions taken” – as not meeting the standard for voluntary intoxication. App. B. However, a reasonable jurist could conclude Dr. Fochtman could have met that standard by explaining that without some other cause, Accutane’s side effects *would* have contributed to Mr. Mullarkey’s actions, thus permitting him to advance a successful involuntary intoxication defense. Thus, the issue is debatable among jurists of reason and the case is worthy of further proceedings. Therefore, the Court of Appeals erred in affirming Judge Mitchell’s ruling and should have issued a COA on whether Judge Mitchell correctly denied Mr. Mullarkey’s IAC claim concerning counsel’s failure to call Dr. Fochtman.

Furthermore, Habeas Counsel for Mr. Mullarkey failed to contact a potential expert witness, Dr. Doug Bremner, who had studied Accutane and its effects, before the Habeas Petition denial.¹⁰ Judge

¹⁰ Dr. Doug Bremner is a researcher and physician at Emory University. He is currently a Professor of Psychiatry and Radiology and Director of the Emory Clinical Neuroscience Research Unit at Emory University School of Medicine. He authored the book “Before You Take That Pill” which discusses the link between Accutane and depression, psychosis and violent behavior. J. Douglas Bremner, *Before You Take that Pill: Why the Drug Industry May be Bad for Your Health*, 45-51 (New York: Avery, 2008). According to Bremner,

There are verifiable accounts of young men and women lighting themselves on fire and jumping off bridges. Questions about the relationship between

Mitchell granted Habeas Counsel's requests for additional time to file a Reply three times based in part on counsel informing the Judge that contact had just been made with an expert (i.e. Dr. Bremner) who may have vital information to Mr. Mullarkey's case. *See* App. B. In Habeas Counsel's final request for time they stated they were awaiting an expert report. *Id.* However, Habeas Counsel failed to respond in a timely manner and never filed a Reply in Mr. Mullarkey's behalf. In fact, Habeas Counsel did not actually contact Dr. Bremner until September 18, 2017 – after Judge Mitchell denied the Habeas Petition.

Thus, Mr. Mullarkey was again prejudiced by his counsels' deficient performance because available evidence of Mr. Mullarkey's intoxication should have been offered in an effort to reduce murder from a high degree to a lower degree. *See* 18 Pa.C.S. § 308. Accordingly, Habeas Counsel's inaction prevented

Accutane and depression and suicide haven been swirling around for the past fifteen years [The manufacture] Roche was still committed to its position that there was no "causal relationship" between Accutane and depression. At the same time Martin Huber, Roche's global head of drug safety, testified under oath in a deposition that Roche's internal assessments showed the Accutane "probably caused" depression and other psychiatric ailments in some users and that the rate of depression among Accutane users was 1.5 times higher than among nonusers.

Id. at 46-47. Dr. Bremner explains that due to the side effects of the drug, the FDA required Accutane's label to warn of depression, psychosis and, rarely, suicidal ideation, suicide attempts, suicide, and aggressive and/or violent behaviors. *Id.* at 47-48.

Mr. Mullarkey from (i) potentially presenting a report and testimony from Dr. Bremner about Accutane's impact on Mr. Mullarkey's actions, and (ii) thus supplementing his claim that counsel provided IAC concerning the voluntary intoxication defense.

The Court of Appeals, therefore, should have issued a COA allowing Mr. Mullarkey to argue on appeal that his case must be remanded to Judge Mitchell for a sufficient period of time within which Mr. Mullarkey could, if appropriate, supplement his claim that trial counsel provided IAC in his handling of Mr. Mullarkey's voluntary intoxication defense based upon information provided by Dr. Bremner.

III. Certiorari should be granted because the United States Court of Appeals for the Third Circuit erroneously applied the COA standard articulated by this Court.

The Court of Appeals' refusal to issue Mr. Mullarkey a COA, after he plainly met the threshold showing set forth by this Court, is a compelling reason to grant this petition. Mr. Mullarkey should not be prejudiced by his attorneys' oversights. This young man and his family will suffer irreparable harm if the Court of Appeals is allowed to refuse a COA where it was demonstrated that a reasonable jurist could conclude that Mr. Mullarkey was denied a constitutional right. There is no question that Mr. Mullarkey's claim involves a constitutional right to effective counsel. Under such circumstances, a COA should only be denied where the district court's conclusion is "beyond all debate." *Welch*, 136 S. Ct. at 1264. The facts above demonstrate that the District

Court's decision to deny the petition is debatable because a reasonable jurist could conclude that Mr. Mullarkey's trial counsel provided IAC by (1) not seeking to suppress Mr. Mullarkey's Statements to the police on Fifth and Fourteen Amendment grounds and (2) by failing to call an expert witness who could have helped Mr. Mullarkey in establishing a voluntary intoxication defense. The Court of Appeals did not elaborate on its reason for denying Mr. Mullarkey's application for a COA, it simply echoed the District Court's order, and in doing so failed to properly address the debatability of the District Court's opinion. Thus, the Court of Appeals improperly denied Mr. Mullarkey a COA.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests the issuance of a writ of certiorari. Petitioner further asks that the Court reverse the United States Court of Appeals for the Third Circuit's opinion that refused to grant a certificate of appealability, vacate the judgment, and remand to the Court of Appeals to issue the certificate of appealability to allow further proceedings in compliance with 28 U.S.C. § 2253.

Respectfully submitted,

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