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*In The*  
**Supreme Court of the United States**

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**TRAVIS TREVINO RUNNELS,**

*Petitioner,*

v.

**LORIE DAVIS, Director,  
Texas Department of Criminal Justice,  
Correctional Institutions Division,**

*Respondent.*

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**ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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**PETITION FOR WRIT OF CERTIORARI**

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**CAPITAL CASE**

**QUESTION PRESENTED:**

- I. **WHETHER CERTIORARI SHOULD BE GRANTED WHEN THE CIRCUIT COURT IMPROPERLY SIDESTEPED THE COA PROCESS AND DENIED MR. RUNNELS AN OPPORTUNITY FOR MERITS REVIEW OF A CLAIM THAT REASONABLE JURISTS WOULD CLEARLY FIND DEBATABLE**

**LIST OF PARTIES**

All parties appear in the caption of the case on the cover page.

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

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Petitioner, Travis Trevino Runnels, respectfully prays that a writ of certiorari issue to review the attached opinion of the United States Court of Appeals for the Fifth Circuit.

**OPINION AND ORDERS BELOW**

The per curiam opinion of The United States Court of Appeals for the Fifth Circuit is reported at 664 Fed. App'x 371 (2016) and reprinted in the Appendix to this Petition ("App.") as Appendix A. The decision of the United States Court of Appeals for the Fifth Circuit denying rehearing is attached as Appendix C. The unpublished decision of the United States District Court for the Northern District of Texas is attached as Appendix B. The unpublished Magistrate's Report and Recommendation

on Petition for Writ of Habeas Corpus, which was adopted by the District Court, is attached as Appendix D.

### **STATEMENT OF JURISDICTION**

The judgment of the United States Court of Appeals for the Fifth Circuit denying certificate of appealability was entered on November 3, 2016. The same court denied Mr. Runnels' petitions for rehearing and for rehearing en banc on December 11, 2017. This Court's jurisdiction is based on 28 U.S.C. § 1254(1).

### **STATUTES AND CONSTITUTIONAL PROVISIONS**

This case involves a state court criminal defendant's right to the effective assistance of counsel. The Sixth Amendment to the United States Constitution provides:

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

In addition, the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

Furthermore, this case involves the correct standard to be used in determining whether to grant a certificate of appealability. Under 28 U.S.C. § 2253(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.

## **STATEMENT OF THE CASE**

### **I. Introduction**

Travis Runnels' trial defense team was little better than a potted plant. Immediately prior to the commencement of his capital trial in 2005, his attorneys convinced him to plead guilty with the promise that they would present a compelling mitigation case in the penalty phase that would lead the jury to spare his life. That defense, however, never materialized. Instead, his attorneys rested without calling a single witness or presenting any evidence in their client's favor. Unsurprisingly, when presented with no mitigating evidence, the jury chose to sentence Mr. Runnels to death. Had defense counsel represented their client effectively, they would have been able to present a wealth of compelling mitigating evidence, including evidence of cognitive dysfunction, learning disabilities, and a history of neglect, trauma, and physical abuse at the hands of family members.

Despite the abject failure of trial counsel to represent their client effectively, the Fifth Circuit determined that Mr. Runnels was not even entitled to a certificate of appealability (COA) on the issue of penalty phase ineffectiveness. App. A at 12. In reaching this conclusion, however, the Fifth Circuit improperly subjected Mr. Runnels' claim to a review on the merits. This Court has warned the Fifth Circuit that it has improperly subjected petitioners to merits review at the COA stage in prior

cases. *Miller-El v. Cockrell*, 537 U.S. 322 (2003); *Buck v. Davis*, 137 S.Ct. 759 (2017). Given the egregiousness of trial counsel's performance in Mr. Runnels' case, this Court should take the opportunity to warn the Fifth Circuit again, and thus certiorari should be granted.

## **II. Procedural Overview**

Travis Runnels was sentenced to death in Potter County, Texas on October 28, 2005. On September 12, 2007, the Texas Court of Criminal Appeals (TCCA) affirmed Mr. Runnels' conviction and death sentence. *Runnels v. State*, 2007 WL 2655682, No. AP-75,318 (Tex. Crim. App. Sept. 12, 2007) (unpublished). On September 17, 2007, Mr. Runnels filed a state court petition for writ of habeas corpus, but the Potter County District Court adopted the State's proposed findings of fact and conclusions of law on October 8, 2010. *Ex Parte Runnels*, No. 48-950-D, 320th Dist. Ct., Potter Cnty., Tex. (Oct. 18, 2010).

On June 8, 2011, the TCCA remanded Mr. Runnels' case for an evidentiary hearing on his ineffective assistance of counsel (IAC) claim. *Ex Parte Runnels*, No. WR-46,226-01 (Tex. Crim. App. June 8, 2011). After the evidentiary hearing, the state district court adopted the State's proposed findings and recommended Mr. Runnels' writ be denied. The TCCA denied Mr. Runnels' habeas petition on March 7, 2012. *Ex Parte Runnels*, No. WR-46,226-01 (Tex. Crim. App. Mar. 7, 2012) (unpublished).

On December 28, 2012, Mr. Runnels filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Texas, Amarillo Division. After supplemental briefing, on March 31, 2016, all claims for relief were

denied. App. B. After filing a timely notice of appeal, Mr. Runnels filed an Application for COA on his trial IAC claim in the Fifth Circuit on June 30, 2016. On November 3, 2016, a Fifth Circuit panel denied his COA request. App. A. The Fifth Circuit denied rehearing and rehearing en banc on December 11, 2017. App. B.

### III. Relevant Facts

#### A. Trial Proceedings

Travis Runnels was charged with the death of Stanley Wiley, a prison factory supervisor at the Clements Unit, on January 29, 2003. *Runnels*, 2007 WL 2655682, at \*1. At the time, Mr. Runnels was an inmate at the prison serving a 70-year sentence for aggravated robbery. *Id.* Despite the nature of the alleged offense, his trial defense team waived any presentation of mitigating evidence, and limited their defense entirely to challenging the State’s assertion that “there is a probability that [he] would commit criminal acts of violence that would constitute a continuing threat to society.” *See* Tex. Code Crim. Pro. Art. 37.071, § 2(b)(1). In Texas, this is commonly referred to as the “future dangerousness special issue.” *See Runnels*, 2007 WL 2655682, at \*1.

Attorneys James Durham and Laura Hamilton were appointed on May 17, 2004 to represent Mr. Runnels at trial. App. A at 3. This was the first capital appointment for Ms. Hamilton, and she had no prior training related to representing capital defendants. App. E at 7-8.<sup>1</sup>

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<sup>1</sup> The transcript of the state habeas evidentiary hearing was reproduced such that four transcript “pages” appear on a single page. In this petition, page number references to this transcript refer to the appendix page number rather than the transcript page number.

Trial counsel retained a private investigator, Kathy Garrison, to conduct Mr. Runnels' background and social history investigation. *Id.* at 8. Garrison uncovered some significant mitigation leads in her investigation and interviews with family members. In Garrison's words, Mr. Runnels' childhood was "disruptive" and "dysfunctional." *Id.* at 17. One of Mr. Runnels' uncles, Ricky Runnels, told Garrison "neither [mother] Nancy or [father] Noel should have been parents, and showed no consistency or support for Travis." App. F at 2.<sup>2</sup> When other family members attempted to intervene and get help for Mr. Runnels, his parents resisted. *Id.* According to Ricky, Mr. Runnels' unstable home life eventually led him to become involved in criminal activity. *See id.* "When asked specifically what could have led to Travis's current situation, Ricky stated nobody took charge and guided him when something could have been done for Travis." *Id.*

Garrison's review of Mr. Runnels' juvenile records also produced promising mitigation leads. Mr. Runnels was confined to a juvenile center twice as a child. *Id.* at 3. The records also reflect Mr. Runnels' chaotic home life, noting that his family was often hard to track down because his mother "was living everywhere." *Id.* at 5. At times, his mother was the responsible party; at other times, it was his grandmother. According to Garrison, "I could not begin to tell you who he was living with at any given time, the family cannot and any documentable information we have in that regard is suspect." *Id.* Garrison also discovered that Mr. Runnels, who is

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<sup>2</sup> Appendix F consists of documents that were submitted as evidence during Mr. Runnels' state habeas evidentiary hearing. To prevent the record from becoming voluminous, only excerpts from relevant emails, reports, and court documents were included.

black, had a history of racial violence in his family. His great-grandfather had been lynched in Dallas in 1910. App. E at 17-18.

The recommendations from a psychological evaluation Mr. Runnels received in 1993 while in juvenile confinement is telling: “Travis needs a highly structured environment with constant supervision; vocational training; he could use a mentoring program with a male role model; perhaps group counseling for peer support to confront maladaptive thinking and facilitate appropriate social and communication skills.” App. F at 5. Despite these recommendations, the juvenile court did not require that Mr. Runnels receive support services that could help him develop these skills, and the chaos in his family life continued. *Id.* at 7.

Trial counsel also retained two mental health experts to assist in trial preparation, Lisa Clayton and Dr. Richard Fulbright. App. D at 6. Dr. Fulbright attempted to administer a neuropsychological examination to Mr. Runnels just a few months before trial. However, he was unable to properly administer the testing because the pass-through at the jail rendered him unable to provide the necessary materials to Mr. Runnels and the absence of an electrical outlet prevented him from administering the tests critical to conclusively determining the presence or absence of attention deficit/hyperactivity disorder (ADHD). App. F at 14. Additionally, correctional officers created a significant amount of noise, further disrupting the testing process. *Id.* at 15. In total, there were approximately 18 tests that Dr. Fulbright was unable to administer because of the adverse conditions in the jail. *Id.* at 15-16.

Despite these significant limitations, Dr. Fulbright concluded it was likely that Mr. Runnels suffered from ADHD, and consistent with that diagnosis it was probable that he had deficits in his “executive functioning that result[s] in his having poor planning, poor impulse control, and difficulty anticipating consequences.” *Id.* at 18. Dr. Fulbright was also able to specifically identify Mr. Runnels’ childhood instability and lack of an educational or social support system as a potential contributing factor to his criminality. *Id.* at 18-19. Additionally, Dr. Fulbright opined that psychological and psychopharmacologic intervention could significantly reduce his aggressive behaviors and diminish his level of agitation. *Id.* at 19.

Despite Dr. Fulbright’s specific explanation to trial counsel that he could not come to a definitive conclusion on the inclusion or exclusion of a neurocognitive diagnosis until further testing could be concluded, counsel did not pursue that testing. Instead, Garrison came to the conclusion that Dr. Fulbright was not going to give them “anything such as MR or mental illness [because] Travis is not stupid nor mentally ill.” App. F at 6. Trial counsel subsequently eliminated Dr. Fulbright as a mitigation witness before he even had the opportunity to comprehensively assess Mr. Runnels. *See* App. D at 24.

Despite these numerous mitigation leads, trial counsel presented absolutely no evidence at trial. On counsel’s advice, Mr. Runnels pleaded guilty to the capital offense. App. A at 3. During the penalty phase, the State presented evidence relevant to both Mr. Runnels’ alleged guilt and the appropriateness of punishment. Seven inmates who had contact with Mr. Runnels on the day of Mr. Wiley’s death testified

against him. App. D at 7. The State also presented the testimony of prison staff regarding Mr. Runnels' history of infractions, including some violent outbursts. *Id.* at 10. Another prison official testified regarding the prison classification system and the level of security that Mr. Runnels would receive should he be sentenced to life imprisonment. *Id.* at 11. Documentation establishing Mr. Runnels' prior convictions for burglaries and robbery with a deadly weapon was also received by the jury. *Id.*

After the close of State's evidence, lead defense counsel Durham told the trial court that he "had one witness who was teaching a class and could not arrive until later that day, one witness about whom Durham wanted to confer, and additional witnesses 'out of Dallas' that were subpoenaed for the following day." *Id.* at 11-12. The court took a brief recess so Durham could determine if the witness teaching a class could come sooner. However, when court resumed, Durham stated that the defense now wished to rest without presenting any evidence. *Id.* at 12. At no point did Durham request a longer recess, a continuance, enforcement of subpoenas, or any other measure that would have given him the time or resources to get a single witness to court to help save his client's life. *See id.*

The State's closing arguments focused on Mr. Runnels' prior convictions and disciplinary infractions and the nature of the offense. In response, the defense argued that Mr. Runnels had shown contrition by pleading guilty, and that there was no evidence of his future dangerousness. Given defense counsel's failure to present any evidence in their client's favor whatsoever, the jury sentenced him to death.

B. State Habeas Proceedings

In his state habeas corpus application, Mr. Runnels alleged his trial attorneys were ineffective in failing to conduct an adequate mitigation investigation and subsequently failing to present any mitigation evidence at trial. *Id.* at 13. The application alleged that trial counsel unreasonably limited their investigation, failed to contact some witnesses, and failed to call other witnesses to testify who were present at the courthouse on the day defense counsel rested. *Id.* at 13-14. The application was supported by affidavits from several of Mr. Runnels' family members, who detailed a wealth of mitigating evidence left unheard by the jury. In general, the application painted a picture that trial defense counsel failed to follow up on witness leads that could have created a richer and more detailed mitigation picture.

Two family members were subpoenaed by trial counsel to testify and did in fact appear at the courthouse on the day that the defense's presentation of evidence would have begun, but were never called to testify: Mr. Runnels' mother Nancy Taylor and his grandmother Lillie Mae Taylor. *Id.* at 13-14. Nancy could have testified to critically important facts about Mr. Runnels' childhood development, including information about his frequent head injuries, difficulty in school, and the possibility that he had dyslexia. *Id.* at 14-15. When Mr. Runnels was fifteen or so, Nancy had an abusive boyfriend named Keith who would physically assault and steal from her. In one instance, Keith strangled both Nancy and Mr. Runnels until Mr. Runnels was able to escape and contact police. *Id.* at 15. Nancy also could have testified about her own physical assaults against her son with belts, switches, and bare fists. *Id.* As

Nancy stated in her affidavit, she, Lillie Mae, and Mr. Runnels' father Noel made the long drive from Dallas to Amarillo so that she could testify, but a member of Mr. Runnels' defense team told her testimony was not needed, so they returned home. *Id.*

Lillie Mae Taylor also noted Mr. Runnels' trouble in school, and said he often had trouble understanding what people told him. *Id.* at 15-16. Mr. Runnels' father was not around much growing up, and Lillie Mae confirmed that Nancy's boyfriend Keith was physically abusive. Mr. Runnels sometimes stayed at Lillie Mae's house to avoid abuse. *Id.* at 16. Like Nancy, Lillie Mae also admitted that she physically assaulted Mr. Runnels at times. *Id.* Lillie Mae also knew information about other family members who suffered the effects of violence. Her own brother was killed in a police confrontation when Mr. Runnels was a young child. In 1910, Lillie Mae's grandfather was murdered by a lynch mob in Dallas. *Id.* As with Nancy, Lillie Mae confirmed that she came to court prepared to testify for her grandson, but was told that she was not needed. *Id.*

Darmonica Runnels, Mr. Runnels' brother, also provided an affidavit to state habeas counsel. He gave detailed information about the violence that he and Mr. Runnels endured as children. He remembered one instance in which they saw a dead body in the street on the way to the bus stop. *Id.* Family life was also dysfunctional and violent. Their mother's brother James, who was frequently drunk, threatened Mr. Runnels with a loaded rifle when he was a child. Another time, James took them to a dope house where they witnessed a shooting. *Id.* at 17. Meanwhile, their mother Nancy was frequently partying and drinking, and the two boys drifted between living

with her and her abusive boyfriend or their father. *Id.* Darmonica also confirmed Mr. Runnels' history of head injuries, including one instance in elementary school in which he ran into a flagpole and knocked himself unconscious. *Id.*

Mr. Runnels' cousin, LaQueena Garcia, could have testified to Mr. Runnels' learning difficulties and problems with reading comprehension, and she also knew about Nancy Taylor's physically assaultive live-in boyfriend. She described Nancy as someone who was out partying every weekend. *Id.* at 19. Another cousin, Joel Runnels, Jr., could have testified about Mr. Runnels' chaotic home life, and how Mr. Runnels had no one to teach that there are consequences for your actions. *Id.* at 20. LaQueena and Joel were not even contacted by Mr. Runnels' defense counsel before trial. *Id.* at 19-20.

Finally, Mr. Runnels stated in an affidavit that he pled guilty only because defense counsel Durham told him that the "real fight" would be showing his good side in the punishment phase. He also stated he provided the defense team with the names of at least thirty family members and ten friends who could testify on his behalf. *Id.* at 20.

On order of the TCCA, the state habeas court held an evidentiary hearing in 2011 to resolve Mr. Runnels' ineffective assistance of trial counsel claim, at which second-chair trial counsel Hamilton and defense investigator Garrison testified for the State. *Id.* at 21. Lead attorney Durham died in 2006. *Id.* at 13.

Hamilton and Garrison offered a litany of vague excuses for their failure to present any evidence in their client's trial. Contrary to the sworn affidavits of family

members, Hamilton and Garrison claimed that Lillie Mae Taylor, Nancy Taylor, and Noel Runnels simply left the courthouse and drove back to Dallas before they could be called to testify. App E. at 6-7, 18. There is, however, nothing on the trial record to indicate that witnesses under subpoena left the courthouse in contravention of court order. Nor were there any requests made for a recess or continuance so that mitigation witnesses could be relocated. Durham requested only a brief break so he could attempt to reach some witnesses, but when he returned to the courtroom, he immediately abandoned this plan and rested his case. App. D at 12. With respect to Mr. Runnels' brother Darmonica, Hamilton claimed he refused to come to court. App. E at 7.

However, Hamilton's later testimony in the same hearing also contradicts the idea that the witnesses' alleged refusal to testify affected their plans for the case. Hamilton told the court at one point that the failure to call any witnesses was "absolutely" a good decision, despite their original intent to call some family members. *Id.* Later, Hamilton also stated that Durham could have gotten the family to return and testify if Durham had tried. *Id.* at 10.

Hamilton and Garrison also expressed reservations about calling certain witnesses for very unclear reasons. Lillie Mae Taylor, for instance, allegedly told Hamilton she had vague concerns about airing the family's "dirty laundry." *Id.* at 4. There is nothing in Hamilton's testimony to indicate that she made an effort to explain to Lillie Mae the importance of sharing unsettling family details with the jury, however. Hamilton also discussed an uncle, retired from the Navy, who had

taken Mr. Runnels to live with him in Japan for some time, but who was excluded as a witness because of unexplained “social” problems he said Mr. Runnels suffered while living there. App. D at 22-23. Other witnesses were supposedly excluded simply because they had criminal records. App. E at 6, 16. Hamilton also stated that they had Mr. Runnels examined by a psychologist and a psychiatrist but failed to present the testimony of mental health experts because “that’s just not what was laid out for us.” *Id.* at 5.

Following the hearing, the state habeas court denied relief. The court relied heavily on its finding that Lillie Mae Taylor, Nancy Taylor, and Noel Runnels departed the courthouse on their own accord to determine that the trial defense team’s failure to present evidence was not the result of ineffective assistance of counsel. App. D at 27-28.

### C. Federal Habeas Proceedings

In his federal habeas petition, Mr. Runnels raised the claim of trial counsel’s penalty phase ineffective assistance. *Id.* at 3. However, the magistrate’s report recommending that habeas relief be denied, which was adopted by the district court, found that the defense team’s investigation into Mr. Runnels’ background was reasonable. *Id.* at 37-40. The report also found that trial counsel’s decision not to pursue additional mental health testing could have been based on a reasonable determination that additional testing would be “fruitless.” *Id.* at 41. With respect to family members, the report found that they walked out of the courthouse on their own accord, and that trial counsel’s failure to attempt to bring them back was a

strategic decision. *Id.* at 42-43. The magistrate also dismissed the failure to develop other witnesses as “cumulative” evidence. *Id.* at 43-44.

The district court’s decision adopting the magistrate’s report relied heavily on the state court’s finding that the subpoenaed witnesses left the courtroom. App. A. In addition to denying habeas relief, the district court’s order denied Mr. Runnels a COA. *Id.* at 2.

D. The Fifth Circuit’s Denial of COA and this Court’s *Buck* Decision

Mr. Runnels subsequently filed a COA application with the Fifth Circuit. The application argued that, under the COA standard, jurists of reason would have found his claim of trial counsel ineffectiveness to be debatable. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); App. G at 9. Specifically, it pointed to the evidence, previously presented in state and federal habeas proceedings, that trial counsel were ineffective in developing mitigating evidence and failing to present any witnesses to the jury. App. G at 9-21.

The Fifth Circuit, however, denied Mr. Runnels’ request. App. A. The court cited the correct “jurists of reason” standard at the outset of its order, which this Court has held should be applied to COA determinations. *Id.* at 6-8. However, the Fifth Circuit’s subsequent analysis relied on standards appropriate for determining whether habeas relief should be granted on the merits. For instance, the court held that for “his application to be granted, Mr. Runnels must demonstrate that it was unreasonable for the state court to conclude that he did not overcome the strong presumption of defense counsel’s competence and that he failed to undermine

confidence in the outcome.” *Id.* at 8. The court also held that for Mr. Runnels’ COA application to be granted, he must prove “that the state court’s decision was contrary to or involved an unreasonable application of [the] *Strickland* [*v. Washington*, 466 U.S. 668 (1984)]” ineffectiveness standard, citing 28 U.S.C. § 2254(d). *Id.* The court went on to hold that “Runnels fails to show an unreasonable application” of *Strickland*, that Runnels cannot “overcome this strong presumption” of effective performance, and that state court findings “shall be presumed to be correct” under 28 U.S.C. § 2254(e)(1). *Id.* at 9-10.

Mr. Runnels asked the Fifth Circuit to reconsider its decision to deny COA in petitions for rehearing and rehearing en banc filed in November 2017. These requests were based, in substantial part, on this Court’s recent decision in *Buck v. Davis*, 137 S.Ct. 759 (2017), which had not been issued at the time COA was denied. *Buck* provides that circuit courts may not “sidestep” the COA process “by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits.” *Id.* at 773. (quoting *Miller-El*, 537 U.S. at 336-337). The Fifth Circuit, however, denied all rehearing requests. App. C.

**REASON FOR GRANTING THE WRIT**

**I. CERTIORARI SHOULD BE GRANTED BECAUSE THE  
CIRCUIT COURT IMPROPERLY SIDESTEPED THE  
COA PROCESS AND DENIED MR. RUNNELS AN  
OPPORTUNITY FOR MERITS REVIEW OF A CLAIM  
THAT REASONABLE JURISTS WOULD CLEARLY FIND  
DEBATABLE**

Mr. Runnels' case is extraordinary for two primary reasons. First, despite this Court's repeated admonitions on the critical importance of mitigating evidence to an effective capital defense, Mr. Runnels' trial counsel failed to present *any* evidence of any kind to the jury. *See, e.g., Wiggins v. Smith*, 539 U.S. 510, 524 (2003). This abject failure of defense counsel to defend their client's life would have been shocking in 1980. In 2005, it was unconscionable. The Fifth Circuit's decision to deny relief would have been wrong under any standard of review. Certiorari should be granted in this case to ensure that a person cannot be condemned to die when defense counsel waive their most basic duty to their client.

The Fifth Circuit's refusal to even grant COA further demonstrates the extraordinary nature of this case. Even before *Buck*, members of this Court had noted the Fifth Circuit's "troubling pattern" of refusing to follow Supreme Court COA precedent. *Jordan v. Fisher*, 135 S. Ct. 2647, 2652 n.2 (2015) (Sotomayor, J., joined by Ginsburg and Kagan, JJ., dissenting from denial of certiorari). This Court's unequivocal language in *Buck* on the correct application of the COA standard should have settled the matter once and for all, but the Fifth Circuit's decision to deny Mr. Runnels' post-*Buck* rehearing requests demonstrates its intent to continue ignoring binding precedent. The Fifth Circuit has effectively created a circuit split born not of

genuine disagreement over legal interpretation, but outright refusal to follow this Court's commands. To deny certiorari in this case would not only deny Mr. Runnels the opportunity to a fair review of his case, but would send a message to the Fifth Circuit that its disregard for precedent is acceptable.

A. The Panel Improperly Applied the COA Standard in Contravention of Years of Supreme Court Precedent

This Court has repeatedly emphasized that the COA stage requires merely a “threshold inquiry” into the suitability of a claim for appellate review. *Miller-El*, 537 U.S. at 326. Here, the Fifth Circuit contravened that well-established law in favor of a standard that was indistinguishable from a merits analysis. In doing so, the court brazenly repeated the same error it has committed in the past, and improperly denied a death-sentenced inmate whose trial counsel presented no evidence at trial the opportunity for fair appellate review of his ineffective assistance of counsel claim. For this reason, certiorari should be granted.

Federal statute provides that COA should issue when a petitioner has “made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). In *Slack v. McDaniel*, this Court held that this standard requires a petitioner to show that “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right . . . .” 529 U.S. at 484. *Slack* plainly established the COA inquiry to be a threshold determination of a claim's mere debatability, separate from the showing required to prevail on a habeas petition on the merits. However, this Court has since been forced to reemphasize its COA standard three times due to the Fifth Circuit's intransigence.

In *Miller-El*, this Court first addressed the Fifth Circuit’s troubling failure to properly apply the COA standard. 537 U.S. at 327. As in Mr. Runnels’ case, the Fifth Circuit in *Miller-El* had denied COA to a Texas death row petitioner seeking to appeal denial of his federal habeas petition. *Id.* at 326. In its order, the Fifth Circuit initially cited to the correct *Slack* COA standard. *Id.* at 330. However, the order also “interjected the requirements of 28 U.S.C. § 2254 into the COA determination,” in particular the presumption that state court findings are correct absent clearing and convincing evidence of their unreasonableness. *Id.* (citing 28 U.S.C. § 2254(e)(1)).

This Court held that this approach by the Fifth Circuit had improperly given “full consideration of the factual or legal bases adduced in support of the claims,” which is a level of analysis appropriate only for merits review. *Id.* at 336. *Miller-El* specifically noted that the Fifth Circuit erred when it “recited the requirements for granting a writ under § 2254” that give considerable deference to state court determinations and applied them to the petitioner’s case. *Id.* at 341. In doing so, Fifth Circuit “sidestep[ped] th[e COA] process by first deciding the merits of an appeal, and then justif[ied] its denial of a COA based on its adjudication of the actual merits, . . . in essence deciding an appeal without jurisdiction.” *Id.* at 336-37.

*Miller-El* should have resolved once and for all that the COA determination is a threshold inquiry that “does not require a showing that the appeal will succeed.” *Id.* at 337. Just one year later, however, this Court again castigated the Fifth Circuit for “paying lipservice to the principles guiding issuance of a COA” while actually

applying a more demanding standard in its analysis. *Tennard v. Dretke*, 542 U.S. 274, 283 (2004). Nonetheless, the Fifth Circuit’s obstinacy continued even after *Tennard*.

This Court’s decision last year in *Buck* demonstrated that little has changed since *Miller-El* and *Tennard*. *Buck* was granted certiorari on an issue similar to the one presented here: whether the “Fifth Circuit impose[d] an improper and unduly burdensome [COA] standard” to a penalty phase ineffective assistance of counsel claim in a Texas capital case.<sup>3</sup> Brief of Petitioner at i, *Buck*, 137 S. Ct. 759, No. 15-8049, 2016 WL 4073689. In reversing the Fifth Circuit’s denial of COA, the *Buck* Court found similar errors as were committed by the Fifth Circuit in *Miller-El*.

As in *Miller-El*, the Fifth Circuit had “phrased its determination in the proper terms” by citing the *Slack* COA standard. *Buck*, 137 S. Ct. at 773. However, the court then proceeded to “essentially decid[e] the case on the merits” by determining that *Buck* did not demonstrate the “extraordinary circumstances” required by Rule 60(b). *Id.* As this Court showed, the Fifth Circuit repeatedly held *Buck* to the Rule 60(b) merits standard throughout its opinion, despite initially quoting the correct COA standard. *Id.* at 773-74.

This Court held, as it did in previous cases, that courts of appeal should limit their COA inquiry to a “threshold” determination of the claim’s debatability among jurists of reason, rather than applying a merits standard. *Id.* at 774. The Fifth

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<sup>3</sup> *Buck*’s case involved a request from COA from denial of relief from judgment under Federal Rule of Civil Procedure 60(b), and thus involved additional procedural questions not present here.

Circuit’s approach “invert[ed] the statutory order of operations” by holding petitioners to standards they are not required by law to meet at the COA stage. *Id.*

If petitioners *Miller-El*, *Tennard*, and *Buck* deserved certiorari, so too does Mr. Runnels. The Fifth Circuit engaged in the same improper COA analysis in Mr. Runnels’ case as it did in *Miller-El* and *Buck* by citing the correct COA standard at the outset but then abandoning all pretense and engaging in a merits analysis throughout the rest of the order. *See Miller-El*, 537 U.S. at 330, 341; *Buck*, 137 S. Ct. at 773-74. This process improperly “invert[ed] the statutory order of operations.” *Buck*, 137 S. Ct. at 774.

The similarities between the instant case and *Miller-El* and *Buck* are striking. In the Fifth Circuit panel’s “Standard of Review” section, the court correctly described the COA standard as a threshold inquiry governed by *Slack* and *Miller-El*. App. A at 6-7. However, in the “Discussion” portion, where the court actually applied the law to the facts of the case, any consideration of the COA standard was immediately abandoned in favor of merits review. *See id.* at 8-12. The court repeatedly held Mr. Runnels to a merits standards throughout, without any references to the “debatability” or “jurists of reason” language of the COA inquiry.

For instance, the panel opinion states that for “his [COA] application to be granted, Mr. Runnels must demonstrate that it was unreasonable for the state court to conclude that he did not overcome the strong presumption of defense counsel’s competence and that he failed to undermine confidence in the outcome.” *Id.* at 8 (citing *Cullen v. Pinholster*, 131 S. Ct. 1388, 1403 (2011)). The opinion goes on to say

that for COA to be granted, Mr. Runnels must prove “that the state court’s decision was contrary to or involved an unreasonable application of [the] *Strickland* [*v. Washington*, 466 U.S. 668 (1984)]” ineffectiveness standard. *Id.* Neither of these holdings is a correct statement of the law, as both refer to the standard for granting relief on the merits under 28 U.S.C. § 2254. The Fifth Circuit thus improperly “interjected the requirements of 28 U.S.C. § 2254 into the COA determination.” *Miller-El*, 537 U.S. at 330.

The Fifth Circuit’s analysis continues in this manner, repeatedly and explicitly stating that it is holding Mr. Runnels to a merits standard without even referencing the controlling COA standard. “Runnels fails to show an unreasonable application of *Stickland* [*sic*].” App. A at 9. Runnels cannot show that “defense counsel’s decision not to retain a mitigation investigator was unreasonable.” *Id.* Runnels must demonstrate “clear and convincing evidence” to overcome the presumption that state court findings are correct. *Id.* at 11 (citing 28 U.S.C. § 2254(e)(1)). All of these assertions by the Fifth Circuit served to “essentially decid[e] the case on the merits” at a stage when such analysis was not appropriate. *Buck*, 137 S. Ct. at 773. Only at the very last sentence of the opinion does the court make a passing, conclusory reference to the “reasonable jurists” standard, but that single sentence does little to undo the pages of improper merits analysis that came before it. App. A. at 12.

While the Fifth Circuit had an opportunity to correct itself by granting Mr. Runnels’ request for rehearing in light of *Buck*, it declined to do so. App. C. This action signaled the Fifth Circuit’s continued insistence on ignoring this Court’s precedent.

As with *Miller-El*, *Tennard*, and *Buck*, certiorari is the only way for Mr. Runnels to receive review of his COA application under the appropriate standard. Without further action by this Court, it is clear that the Fifth Circuit's blatant defiance of established COA jurisprudence will continue indefinitely, affecting not only Mr. Runnels, but countless others. Accordingly, certiorari should issue.

B. COA Is Unquestionably Appropriate When Applying the Correct Standard

Had the Fifth Circuit conducted the correct COA analysis prescribed by this Court, Mr. Runnels' COA application would have been granted. "[A]n overview of the claims in the habeas petition and a general assessment of their merits" reveals that Mr. Runnels' claim of trial ineffectiveness was, at the very least, debatable among jurists of reason. *Miller-El*, 537 U.S. at 336.

In essence, Mr. Runnels' claim alleged that his trial counsel were ineffective in failing to present any witnesses on his behalf in mitigation of punishment after advising him to plead guilty to capital murder. To prevail on an ineffective assistance claim, the petitioner must demonstrate that trial counsel's performance was objectively unreasonable and that there is a reasonable probability that the outcome of the case would have been different if counsel had performed adequately. *Strickland v. Washington*, 466 U.S. 688 (1984). In the context of a capital case, objectively reasonable performance includes a duty to make efforts "to discover *all* reasonably available mitigating evidence," including "medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences." *Wiggins v. Smith*, 539

U.S. 510, 524 (2003) (emphasis added). As *Wiggins* suggests, this Court has repeatedly emphasized that, in a capital case, counsel have a duty to discover *all* mitigating evidence that is reasonably available to them, not just some of it. *See id.* Moreover, when trial counsel are faced with evidence that contains both favorable and unfavorable elements, “the failure to introduce the comparatively voluminous amount of evidence that [does] speak in [their client’s] favor [is] not justified by a tactical decision” to not present mitigating evidence. *Williams v. Taylor*, 529 U.S. 362, 396 (2000).

In *Williams*, for instance, trial counsel presented some mitigating evidence in the sentencing phase consisting of “the testimony of Williams’ mother, two neighbors, and a taped excerpt from a statement by a psychiatrist.” *Id.* at 369. The lay witnesses testified to Williams’ non-violent nature, while the psychiatrist related Williams’ statement that “in the course of one of his earlier robberies, he had removed the bullets from a gun so as not to injure anyone.” *Id.* In state post-conviction proceedings, additional mitigating evidence was uncovered, in particular juvenile records describing Williams’s abusive upbringing and mental impairments. *Id.* at 370. The state court, however, ultimately denied relief, holding that the omitted evidence would not have overcome the significant aggravating evidence that Williams was a future danger to society. *Id.* at 371-72.

This Court, however, held that the state court’s determination was unreasonable under 28 U.S.C. § 2254(d). *Id.* at 397-98. The state court had unreasonably ignored the additional new evidence presented in state post-conviction

hearings in reaching its determination. *Id.* at 398. Moreover, the fact that this new evidence would have opened the door to potentially aggravating facts, including childhood larceny and breaking and entering convictions, did not excuse trial counsel's failure to present it. *Id.* at 396.

Similarly, in *Wiggins*, trial counsel presented evidence in the penalty phase that their client, while perhaps guilty, was not the person primarily responsible for killing the victim. 539 U.S. at 515. No evidence related to Wiggins' life history was presented. In state post-conviction proceedings, additional mitigating evidence was advanced in support of an ineffective assistance claim, including evidence of severe abuse at the hands of family members. *Id.* at 516. The state court, however, denied relief, finding that trial counsel's decision to focus on Wiggins' level of participation in the crime instead of his life history was a matter of reasonable trial tactics. *Id.* at 517-18.

Although the circuit court held that the state court's assessment was reasonable under 28 U.S.C. § 2254, this Court reversed. The *Wiggins* Court highlighted capital trial counsel's duty to investigate under the American Bar Association standards in determining whether trial counsel acted reasonably in failing to present mitigating evidence. *Id.* at 522-23. While trial counsel had obtained some mitigating evidence consisting of a pre-sentence report describing Wiggins' difficult childhood and social services records describing his time in foster care, they had decided not to expand their investigation beyond these items. *Id.* at 524. Trial counsel's decision was thus unreasonable under *Strickland*, as they had to comply

with the duty to “discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.” *Id.* Trial counsel may not simply “abandon[] their investigation of petitioner’s background after having acquired only rudimentary knowledge of his history from a narrow set of sources.” *Id.* Accordingly, the state court’s conclusion that trial counsel’s investigation met the requirements of *Strickland* was an “objectively unreasonably application” of precedent under 28 U.S.C. § 2254(d)(1).

If this Court held that *Williams* and *Wiggins* justified relief under the demanding standards of section 2254, then Mr. Runnels is at least deserving of a COA. Unlike in *Williams* and *Wiggins*, where at least some evidence was presented in mitigation, Mr. Runnels’ trial counsel presented no evidence of any kind in defense of their client.

Even if one accepts the state court’s highly-contested finding that Mr. Runnels’ mother, grandmother, and brother left the courthouse of their own accord before they were called to testify, trial counsel fell short of their duty to “discover *all reasonably available* mitigating evidence.” *Wiggins*, 539 U.S. 524; App. D at 27-28. Nor did trial counsel’s numerous vague excuses for their failure to defend their client meet this Court’s standard for what constitutes a reasonable strategic decision.

First, trial counsel did nothing to attempt to bring the family members who allegedly walked out back into court, despite the fact that surviving defense attorney Hamilton believed that lead counsel “Mr. Durham could have done that.” App. E at 10. These witnesses could have testified about Mr. Runnels’ abusive family life, the

violence he suffered at the hands of his mother and mother's boyfriend, his history of head trauma, and his learning difficulties. *See* App. D at 13-17. Trial counsel made no request for a continuance or any other accommodations to get these witnesses, who were under subpoena, back into court. Hamilton's only explanation for the defense team's failure to take these steps was a vague concern about the "harm that could have come from their testimony." App. E at 10. The nature of this harm was never explained, nor was there any attempt by the defense team to mitigate this "harm."

Thus, these witnesses did not truly "ma[ke] themselves unavailable" as the Fifth Circuit panel described, and their failure to testify was not an act beyond trial counsel's ability to control. App. A at 9-10. Rather, the failure to call them was a strategic decision, albeit an unreasonable one, based on trial counsel's vague, unexplained belief that their testimony would cause "harm."<sup>4</sup> But as this Court explained in *Williams*, "failure to introduce the comparatively voluminous amount of evidence that [does] speak in [their client's] favor [is] not justified" simply because that evidence contains some aggravating elements. *Williams*, 529 U.S. at 396. And at least in *Williams*, trial counsel were able to identify the aggravating element—

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<sup>4</sup> The Fifth Circuit panel found that "[g]iven that the prosecution would have likely brought up that the family members had been unwilling to appear, defense counsel could have reasonably assumed that the family members' testimony would have been 'double-edged,'" but this assertion is not supported by any actual statements by defense counsel. *Id.* at 11. Furthermore, a vague, hypothetical concern that witnesses might be cross-examined regarding their discomfort on the witness stand hardly justifies the failure to call them in light of the "voluminous amount of [mitigating] evidence" they could have provided. *Williams*, 529 U.S. at 396 (2000). The panel's invented excuse is especially unreasonable given that these were the *only* family members that trial counsel had prepared for testimony.

childhood criminal convictions—that they were concerned about. *Id.* Here, Hamilton offered nothing.

Second, trial counsel failed to develop other mitigating evidence and ultimately chose not to subpoena them for vague and unreasonable reasons. For instance, trial counsel ceased communicating with an uncle who had taken Mr. Runnels to live with him in Japan as an escape from his troubled home life because of unexplained “social” problems Mr. Runnels suffered there. App. D at 22-23. Given Mr. Runnels’ troubled life history, a “social problem” could be a potentially mitigating factor that might support the defense case, but counsel could not make this determination because they never bothered to learn. Other witnesses, who knew Mr. Runnels in childhood, were excluded because of their criminal histories. *Id.* at 19. However, if trial counsel’s failure to introduce mitigating evidence that would have revealed their own client’s criminal record in *Williams* was unreasonable, certainly trial counsel’s similar decision regarding a witness’s record cannot be reasonable either. *See Williams*, 529 U.S. at 396.

Finally, some witnesses were simply never located or interviewed, despite the fact that they were readily found by state habeas counsel. Mr. Runnels’ cousins LaQueena Garcia and Joel Runnels, Jr. both had significant knowledge of Mr. Runnels’ neglectful mother, his chaotic and abusive home life, his mother’s violent boyfriend, and his significant learning difficulties. App. D at 18-20. Trial counsel offered no explanation for their failure to locate these witnesses. Thus, trial counsel did not “discover *all reasonably available* mitigating evidence.” *Wiggins*, 539 U.S. at

524. Rather, they impermissibly “abandoned their investigation of petitioner’s background after having acquired only rudimentary knowledge of his history from a narrow set of sources.” *Id.*

The Fifth Circuit erred in failing to grant Mr. Runnels’ application for COA. As *Williams* and *Wiggins* demonstrate, this Court has held that relief on the merits under 28 U.S.C. § 2254 is justified in similar circumstances. Mr. Runnels’ claim is clearly debatable by jurists of reasons under the much lower COA threshold standard. *See Buck*, 137 S. Ct. at 774. Had the Fifth Circuit panel applied the correct standard of review to the issue before it, COA would have been granted. Certiorari should be granted in this case not only to ensure that this Court’s COA-related precedent is respected, but also because the extraordinary nature of trial counsel’s failures in Mr. Runnels’ case are more than “adequate to deserve encouragement to proceed further.” *Slack*, 529 U.S. at 484 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (2000)).

### C. Relief Is Appropriate Under Any Standard of Review

While certiorari is appropriate in this case because Mr. Runnels was improperly denied COA, the Fifth Circuit’s decision would have been improper under *any* standard of review, including a merits standard. This Court has granted relief on the merits in multiple capital penalty phase ineffective assistance cases despite unfavorable state court findings regarding the performance prong of *Strickland*. 28 U.S.C. § 2254(d). And, in many of these prior cases, trial counsel at least presented *some* evidence in mitigation.

In *Wiggins*, for instance, trial counsel put on evidence that their client was not primarily responsible for the crime. 539 U.S. at 515. In *Rompilla v. Beard*, the jury heard from several family members who “argued in effect for residual doubt, and beseeched the jury for mercy” and from Rompilla’s 14-year-old-son, who testified to his love for his father. 545 U.S. 374, 378 (2005). This Court, again, rejected the state court’s conclusions that defense counsel rendered effective assistance, because it determined that trial counsel had failed to investigate reasonably available leads. *Id.* at 389-90.

If the state courts’ conclusions regarding defense counsel’s performance were unreasonable in these cases, then the conclusions in this case, where counsel offered no evidence of any kind, are unreasonable as well. As demonstrated above, trial counsel acknowledged in state habeas proceedings that they had the opportunity to present mitigating evidence, but they chose not to. App. E at 10. Other readily available mitigation witnesses were either undeveloped or undiscovered. App. D at 19-20, 22-23. Any state court conclusion that trial counsel performed effectively cannot be considered reasonable under *Wiggins* and its progeny.

Mr. Runnels also succeeds on the merits on *Strickland*’s prejudice prong. Given counsel’s failure to present any evidence whatsoever in spite of the powerful evidence in mitigation that was available, including evidence of Mr. Runnels’ neglectful parents, physical abuse at the hands of family members, childhood head trauma, brain dysfunction, cognitive limitations, and significant learning disabilities, “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of

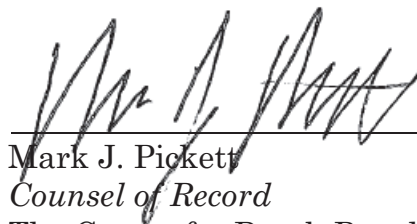
the proceeding would have been different.” *Strickland*, 466 U.S. at 694. While the facts surrounding Mr. Runnels’ offense may have been aggravating, this Court has repeatedly recognized the power of mitigating evidence, when competently presented, to overcome even brutal murders and murders involving multiple victims. This includes some cases with state court findings that the petitioner was not prejudiced by counsel’s performance. *See, e.g. Williams*, 529 U.S. at 418 (Rehnquist, C.J., dissenting) (granting relief for petitioner despite significant evidence of future dangerousness, including evidence that he had “savagely beat[en] an elderly woman [and left her in a vegetative state], stole[n] two cars, set fire to a home, stabbed a man during a robbery, set fire to the city jail, and confessed to having strong urges to choke other inmates and to break a fellow prisoner’s jaw”); *Wiggins*, 539 U.S. at 414 (granting relief for petitioner who drowned a 77-year-old woman in a bathtub and ransacked her apartment); *Rompilla*, 545 U.S. at 397-99 (Kennedy, J., dissenting) (granting relief despite evidence that petitioner, who had prior convictions for rape, burglary, and theft, had stabbed the victim multiple times across his neck and head, beaten him with a blunt object, and set his body on fire); *Porter v. McCollum*, 558 U.S. 30, 30 (2009) (per curiam) (relief for petitioner who had murdered both his ex-girlfriend and her boyfriend).

For these reasons, certiorari should be granted in this case not only because COA should have been granted, but because relief would have been appropriate even if the Fifth Circuit panel had been tasked with a merits review.

**CONCLUSION**

For all of the foregoing reasons, Mr. Runnels' case is an extraordinary one deserving of review by this Court. At a minimum, COA should have been granted in this case, and would have been had the Fifth Circuit panel not ignored this Court's clear precedent. Certiorari by this Court is warranted not only to secure fair appellate review for Mr. Runnels, but to ensure that this Court's decisions will not continue to be ignored.

Respectfully submitted, this the 9th day of March 2018.



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