

IN THE
Supreme Court of the United States

PETE RUSSELL,
Petitioner,

v.

BOBBY LUMPKIN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

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

**RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI**

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This is a capital case.

QUESTION PRESENTED

Did the Fifth Circuit Court of Appeals properly deny a certificate of appealability on Russell's claim that he received ineffective assistance of counsel at the punishment phase of his trial with respect to future dangerousness?

TABLE OF CONTENTS

QUESTION PRESENTED	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES	iv
BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI	1
STATEMENT OF THE CASE	1
I. Facts of the Crime.....	1
II. Subsequent State and Federal Court Proceedings	9
REASONS FOR DENYING THE WRIT	11
ARGUMENT	12
I. The Fifth Circuit Panel applied the correct COA standard.	12
II. The Fifth Circuit Properly Denied COA Because the District Court’s Denial of Russell’s Claim Was Not Debatable.....	16
III. No Compelling Reason Otherwise Exists to Grant Certiorari.	23
CONCLUSION.....	24

TABLE OF AUTHORITIES

Cases	Page
<i>Bryant v. Scott</i> , 28 F.3d 1411 (5th Cir. 1994)	18
<i>Buck v. Davis</i> , — U.S. —, 137 S. Ct.759 (2017)	12-15
<i>Cullen v. Pinholster</i> , 563 U.S. 170 (2011)	12
<i>Day v. Quarterman</i> , 566 F.3d 527 (5th Cir. 2009)	17
<i>Gregory v. Thaler</i> , 601 F.3d 347 (5th Cir. 2010)	18
<i>Harrington v. Richter</i> , 562 U.S. 86 (2011)	11, 17, 19, 21
<i>Jordan v. Fisher</i> , 135 S. Ct. 2647 (2015)	14
<i>Knowles v. Mirzayance</i> , 556 U.S. 111 (2009)	17
<i>Miller-El v. Cockrell</i> , 537 U.S. 322 (2003)	12-15
<i>Rompilla v. Beard</i> , 545 U.S. 374 (2005)	18
<i>Slack v. McDaniel</i> , 529 U.S. 473 (2000)	12-13
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	passim
<i>United States v. Green</i> , 882 F.2d 999 (5th Cir. 1989)	18
<i>Wiggins v. Smith</i> , 539 U.S. 510 (2003)	17-18, 21
<i>(Terry) Williams v. Taylor</i> , 529 U.S. 362 (2000)	11
<i>Wong v. Belmontes</i> , 558 U.S. 15 (2009)	18
<i>Yarborough v. Alvarado</i> , 541 U.S. 652 (2004)	12
 Statutes	
28 U.S.C. § 2253	12-13

28 U.S.C. § 2254	passim
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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner Pete Russell was convicted and sentenced to death for the capital murder of Tanjela Brewer. During the course of committing the offense of retaliation, Russell stabbed and killed Brewer.

Russell now petitions this Court for a writ of certiorari from the Fifth Circuit's denial of a certificate of appealability (COA). Upon denial of his petition in the district court, Russell sought a COA from the Fifth Circuit on six claims, one of which is relevant to the present proceeding.

The Fifth Circuit Court of Appeals denied Russell's application for COA and Russell now asks this Court to issue a writ of certiorari to decide the question of whether the Fifth Circuit improperly denied a COA on one of his ineffective assistance of trial counsel (IATC) at punishment claims.

STATEMENT OF THE CASE

I. Facts of the Crime

The Fifth Circuit Court of Appeals summarized the factual background of this case as follows:

Tanjala Brewer was a paid confidential informant for the Houston Police Department under narcotics officer D.K. Bush. Brewer and Pete Russell dated for about a year-and-a-half. After the romantic relationship between Russell and Brewer ended, she took an undercover officer, Bush, to Russell's house and introduced him to Russell as her nephew. Believing Brewer, Russell agreed to sell the undercover officer several ounces of crack cocaine. After the transaction, Russell was arrested. On August 9, 2001, Russell

pleaded guilty to delivery of a controlled substance and received a ten-year sentence. However, Russell successfully requested that the court delay the date for execution of his sentence until September 7.

Around 11 p.m. on August 12, Brewer's neighbor saw Brewer and Russell walking down the street together near Brewer's house. About 1 a.m., the neighbor heard Brewer's screen-door close and saw Russell walking and then running down Brewer's driveway toward the street.

Before noon on August 13, 2001, family members discovered Brewer's body lying on her kitchen floor. Brewer's throat had been slit and she had been stabbed multiple times with a kitchen knife. There was also evidence of asphyxiation and shoe imprints indicating someone had stomped on her legs and stomach. Bloody drag marks indicated she had been dragged from her bedroom to the kitchen, where she was posed in a spread-eagle position with her skirt raised and a crack pipe in her hand. Someone had written on a mirror and wall with blood. Natural gas valves were turned on in the home and candles were left burning. The toxicology report pursuant to Brewer's autopsy revealed the presence of a significant amount of cocaine in her system.

Based on the neighbor's account and evidence at the scene, Russell became a suspect. Authorities located Russell a few days later, sitting in a motel room bathtub, fully clothed and foaming at the mouth from ingesting poison in an apparent suicide attempt. Russell was taken to the hospital and his stomach was pumped. Authorities discovered a diamond ring in Russell's pocket.

Russell subsequently gave two recorded statements, one at the hospital and one at the jail the following day, admitting guilt. The recordings were introduced at trial and transcripts were provided for reference. The preceding facts are largely undisputed. Russell admits that he killed Brewer. However, he disputes why he killed her. This goes to whether he committed capital murder. Here, that is murder in the course of committing or attempting to commit another crime, i.e., retaliation, under Texas law.

During Russell's first recorded statement at the hospital, Houston Police Department Sergeant Hal Kennedy asked him, "[i]n your own words tell me what happened and why you did what you did." Russell replied that, "[Brewer]. . . She set—she set me up—she set me up with the police." When asked how Brewer set him up, Russell said:

She brought an undercover to my house saying it was her nephew that her nephew wanted to buy some drugs . . . and about fifteen or thirty minutes later her nephew which is the undercover, call me and I met him up there at Family Dollar – McDonald's and that's when I got busted.

Russell later said, "[a]nd then you know what I'm saying we broke up and that's when she set me up with the laws." When Kennedy asked how it is that Brewer got killed, Russell responded:

Basically, ah I went over her house and you know since she let me in and she was smoking some drugs whatever and you know we were just talking whatever you know about the things we used to do and I was basically asking her "Why did you set me up?" "Why did you set me up?" and she kept on denying it talking bout "I ain't set you up." "I ain't set you up." Saying "if you would have stayed with me none of this would have happened" whatever. And, basically, you know what I'm saying I just . . . I just went off. I just snapped.

Russell also stated:

It just . . . It just happened all the while she was smokin' you know what I'm saying and the last thing she said, "If you would have stayed with me it would have never happened." And the next thing I know I just snapped like that you know there was a knife on the lit dresser right there and I just grabbed it and jumped on her right there.

Officers went to the jail the following day to take photographs of a cut on Russell's hand and he gave a second recorded statement. During that second statement, Russell said that he did not mean to kill Brewer and that "I really like to say though that I'm sorry and that I really loved [Brewer] and if ah I could do it all over again, it wouldn't have happened." When asked if he just lost his temper, Brewer replied:

Yes sir, I just snapped and like a say I loved her, I loved the family you know that I'm saying, the son and everything and if I had the chance to do it over again, I wouldn't have done it. I want her family to know that I'm sorry and her friends you know that I'm sorry and that ah I would always love her and everything.

The [S]tate charged Russell with capital murder in the course of committing or attempting to commit retaliation based on Brewer informing the police of Russell's drug dealing. Russell went to trial in 2003, and multiple witnesses testified.

Andre Wilson lived across the street from Brewer and knew both Brewer and Russell. Wilson also knew that Russell was jealous over Brewer. The evening before Brewer was murdered, Wilson said he saw Brewer and Russell walking down the street together away from Brewer's house. Wilson said Brewer acted normal and asked him for a cigarette. Wilson also testified that he thought Russell and Brewer were still dating at the time. Some hours later, around 11 p.m., Wilson saw Russell and Brewer walking back toward Brewer's house. At approximately 1 a.m., Wilson was on the porch at his grandmother's house, which was next door to Brewer's, and heard a screen door slam. Wilson then saw Russell walking and then running away from Brewer's house.

At the time of her death, Brewer was also involved in a relationship with Wilbert Reed, Jr. Reed said he last saw Brewer alive at approximately 12:15 a.m. on August 13, 2001. Reed said he had talked to Brewer on the telephone and she wanted him to come by to see her and drop her off some money before he went to work driving a truck. Reed went by Brewer's house around 11:30 p.m. and testified that Brewer was happy

and in a very good mood during the forty-five minutes he was there. Upon leaving Brewer's house, Reed said he called Brewer on his cell phone and they talked a few different times. When Reed called Brewer back between 12:45 and 1 a.m., he received a busy signal. Reed said he attempted to call Brewer multiple times throughout the remainder of the night but kept getting a busy signal and never talked to her again.

Reed testified that he and Brewer had plans for him to pick her up when he got off work. After Reed got off work, he went by Brewer's house a couple of times, but nobody answered the door. Reed said that he was angry, so, he wrote a note and slid it under the door. In the note, Reed essentially accused Brewer of using him and stated, "I guess Pete is the best man for you." Reed testified that he did not know Russell but knew Brewer and Russell had been in a relationship. Reed also said that Brewer was afraid of Russell.

Kennedy's probable cause affidavit stated that Reed told him Russell had been harassing Brewer, and that Brewer told him on the night of the murder that Russell had come over to her house and tried to force entry.

Deborah Calhoun, Brewer's best friend for about six years, also testified at trial regarding the relationship between Russell and Brewer, who she said were in love with each other. Calhoun said she was friends with both Brewer and Russell and talked to them both daily during the last two weeks of Brewer's life. Calhoun testified that Russell had left a handwritten letter at Brewer's house around August 3, 2001. The letter, which was introduced as an exhibit at trial, stated:

Tanjala, you are a good person. At the same time you have a dope-smoking habit. You have lied, stole and cheated all in the name of crack. I cannot trust you [no] more. You are evil and out to hurt me. You mean well, but the drugs keep on calling you. I don't need you [no] more. So go back to your X X X X.

When asked about Brewer's demeanor when she read the letter, Calhoun answered, "We never thought nothing of the letter. We

just laughed it off.” However, Calhoun also testified that Brewer was afraid and scared of Russell during the last two weeks of her life. Calhoun also recounted incidents of jealousy on the parts of both Russell and Brewer. Calhoun testified that Russell had taken Karen Foster to Brewer’s house once when she was there and indicated Foster was his girlfriend.

Calhoun said she did not know Brewer was working as an informant. More importantly, Calhoun said that Russell never gave her the impression he knew Brewer was an informant. Following that statement, the court took a short recess. After the break, the prosecutor asked Calhoun whether Russell had ever indicated to her that he knew Brewer set him up. Calhoun responded affirmatively and said Russell was angry about it around the beginning of July 2001.

On cross-examination, Calhoun said Russell was not sure whether Brewer had set him up, but that he had said “a lot of people in the neighborhood told him that she done it.” Calhoun indicated Russell’s uncertainty stemmed from him still loving Brewer, and that he had never told her anything about wanting to retaliate against Brewer. Further, Calhoun said that toward the end of July or the beginning of August, Russell had shown her the ring that was in his possession at the time of his arrest and indicated it was for Brewer. Calhoun testified that she told Russell that Brewer was not going to accept the ring.

Bush, who was the undercover officer Brewer introduced to Russell as her nephew, testified that he saw Russell twice after the drug sting in which Russell and Foster were arrested. The first time Bush saw Russell was just a few weeks after Russell’s arrest in May 2001. Russell was walking out of the jail as Bush was going into the jail. The second time, Brewer brought Russell with her on July 20, 2001 to pick up payment for informant work on another case. However, Bush said Russell did not exit the car, which was about 100 yards away, and neither saw him nor Brewer getting in his car. Bush also testified he questioned Brewer about bringing Russell and she said it was not Russell but that it was an older man who lived near her neighborhood and gave her a ride.

Russell testified at trial that he and Brewer had dated for about a year-and-a-half. He said their relationship broke down after he got arrested. Russell also said Foster was not his girlfriend, but rather a woman he worked with at the retirement home. Russell said that, after he bonded out on the drug charge, he contacted Brewer and the following exchange occurred: "When I called her and asked her what happened she said, 'Baby, don't get mad. I heard what happened. I'm trying to get in touch with my nephew right now.'" Russell said he believed her. Russell said Brewer told him about Reed, and he was suspicious, but she said Reed was just a friend.

Russell said that he knew Brewer used drugs and that she had asked him for drugs. He also said she would get drugs from Donald Ray Hawkins. Russell said he was jealous of Brewer's relationship with Hawkins because he once caught her laying across his bed in the motel where Hawkins lived.

Russell testified that he had purchased the wedding ring for Brewer around August 1 and planned to give it to her the night she was murdered. Russell said Brewer had called him and asked him to give her some money for drugs. He said he took the ring when he went to her house with the intention of proposing to her. Russell said he arrived close to 1 a.m. He testified that, as Brewer was sitting on the bed smoking crack, he inquired as to where she was going to get drugs and she said: "I'm going to get it down the street from Donald Ray [Hawkins]." Russell said he told Brewer, "no," and the couple got into a very heated argument. Russell testified that the following then transpired:

And I just told her, You act like you fucking Donald Ray, like that.

Then she had picked up a knife a kitchen knife that she had on the table. She picked up a kitchen knife. She said, I am fucking him Pete. I been fucking him.

That's when I picked up a knife off the table and I called her a bitch. I called her a bitch.

And she said, Fuck you, Pete. Fuck you, Pete. She

came at me with a knife and, and I pulled my hand up. She cut me across my hand. I began just to out of anger and rage, I just began to stab her and stuff.

Russell said that he felt like he “had been played, you know what I am saying, messed over after all I did.”

Russell said that he fainted after he stabbed Brewer, and when he came to, a voice in his head that he believed to be God was telling him, “Tell them who I am.” So, he wrote on the wall and mirror in blood. He further said that the body and house were staged to represent the five elements of the universe: Earth, wind, fire, water and air. Russell said that he put the crack pipe back in Brewer’s hand to represent “the hurt” and “her habit. This was her hell.”

Russell said, after murdering Brewer, he first went home, then to hideout at a bayou behind his childhood elementary school, and then to the motel, where he stayed a couple of days before being arrested. He said he took the rat poison because the voice told him to “come home.”

Russell claimed he did not know Brewer had set him up until Kennedy told him at the hospital, “I know all about it. I know your girl set you up with the law.” Russell said Kennedy also told him that he knew Brewer was “messing” with Hawkins. Russell testified that he did not stab Brewer because she informed on him; he stabbed her because she told him she was having sex with Hawkins and then cut his hand.

Officer Richard Moreno accompanied Russell in the ambulance after his arrest. Moreno testified on rebuttal that Russell told him the diamond ring in his watch pocket was for his girlfriend, Foster, who was in jail on the same drug case in which Brewer had set up Russell. Further, Russell said he and Foster were going to be married when she made bond. However, Moreno did not include any of that in his report, and Kennedy testified that Moreno refrained from conversation with Russell in the ambulance.

Russell v. Lumpkin, No. 19-70015 (5th Cir. 2020) (citations omitted) (Pet. App. 1 at 2–10).¹

At punishment, the State presented a variety of witnesses that testified to Russell’s previous violent acts, drug dealing, and the significance of the victim’s loss on those who knew and loved her. *See* Pet. App. at 2; Pet. App. 4 at 4–5. Kirk Fletcher testified to being robbed at gunpoint by Russell on October 2, 1991 when he was an employee at a store named Apple Tree. *Id.* The jury heard from Devarick Williams, who lived in the same neighborhood as Russell. Williams testified about Russell shooting him on June 29, 1991. *Id.* A resident of Russell’s neighborhood testified about witnessing Russell point a gun in a man’s face while he was simply waiting at a bus stop. *Id.* The same witness saw Russell “jump[] on” another man because the man owed Russell money. *Id.* This assault occurred the week prior to the murder. *Id.* Finally, the State introduced a penitentiary packet and stipulation of evidence that proved Russell’s convictions for the offenses of aggravated robbery, aggravated assault, and for delivery of a controlled substance. *Id.*

II. Subsequent State and Federal Court Proceedings

On February 17, 2003, Russell was convicted of capital murder and sentenced to death for the murder of Tanjala Brewer during the commission of

¹ “Pet.” refers to Russell’s Petition for Writ of Certiorari. “Pet. App.” refers to the appendices to that petition.

retaliation. The conviction and sentence were affirmed on direct appeal to the Texas Court of Criminal Appeals (CCA). *See* Pet. App. 1 at 11. Russell filed a state application for writ of habeas corpus, and based on the trial court's findings and conclusions, and the court's own review, the CCA denied habeas relief. *See Id.* Russell then filed a federal habeas petition, followed by a motion for stay and abeyance in order to return to state court to exhaust issues not yet raised on state habeas. The district court granted Russell's motion, but the CCA dismissed the new application as an abuse of the writ without reaching the merits. *Id.* Upon return to federal court, Russell filed an amended petition. *See Id.* at 12. The Director filed a motion for summary judgment and answer with brief in support. Russell responded to the motion and the Director filed a sur-reply. On July 29, 2019, the district court entered a final judgment denying Russell's petition with prejudice and denying a COA. Pet. App. 2.

Russell appealed to the Fifth Circuit Court of Appeals and requested a COA on six issues. Relevant to the present proceeding, Russell sought to appeal the district court's decision on his claim of IATC with regard to the future dangerousness issue at punishment. The Fifth Circuit denied Russell's application for COA. Pet. App. 2. Russell now petitions this Court for a writ of certiorari.

REASONS FOR DENYING THE WRIT

Russell presents no compelling reason for granting review on writ of certiorari, and none exists. *See* Sup. Ct. R. 10 (Certiorari review “is not a matter of right but of judicial discretion,” and “will be granted only for compelling reasons.”) Indeed, the issue in this case involves only the lower court’s proper application of this Court’s precedent. Further, Russell does not allege any circuit split on the proper application of precedent, as none exists. Accordingly, the petition presents no important question of federal law to justify the exercise of this Court’s certiorari jurisdiction.

Under 28 U.S.C. § 2254(d), a federal court may not issue a writ of habeas corpus for a defendant convicted under a state judgment unless the adjudication of the relevant constitutional claim by the state court, (1) “‘was contrary to’ federal law then clearly established in the holdings of” the Supreme Court; or (2) “‘involved an unreasonable application of” clearly established Supreme Court precedent; or (3) “‘was based on an unreasonable determination of the facts’ in light of the record before the state court.” *Harrington v. Richter*, 562 U.S. 86, 100 (2011) (quoting *(Terry) Williams v. Taylor*, 529 U.S. 362, 412 (2000)).

Section 2254(d) reflects the view that habeas corpus is a guard against extreme malfunctions in state criminal justice systems, not a substitute for ordinary error correction through appeal.

“A state court’s determination that a claim lacks merit precludes federal habeas relief so long as ‘fairminded jurists could disagree’” on the correctness of the state court’s decision. *Harrington*, 562 U.S. at 87 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). Further, in reviewing a state court’s merits adjudication for reasonableness, a federal court is limited to the record that was before the state court. § 2254(d)(2); *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

ARGUMENT

I. The Fifth Circuit Panel applied the correct COA standard.

Russell argues that the Fifth Circuit’s application of the standard for granting a COA was overly burdensome and ventured too far into the realms of a merits decision. Pet. at 35–39;² see *Buck v. Davis*, — U.S. —, 137 S. Ct. 759 (2017); *Miller-El v. Cockrell*, 537 U.S. 322 (2003); *Slack v. McDaniel*, 529 U.S. 473 (2000). Russell asserts that, in contravention of this Court’s clear precedent, the Fifth Circuit panel rejected Russell’s claim on the merits instead of assessing the debatability of the district court’s opinion. *Id.* Russell is wrong.

As a jurisdictional prerequisite to obtaining appellate review, Russell was first required to obtain a COA. 28 U.S.C. § 2253(c)(1)(A). The COA statute requires the circuit court to make only a “threshold inquiry into whether the

² “Pet.” refers to Russell’s Petition for Writ of Certiorari. “Pet. App.” refers to the appendices to that petition.

circuit court may entertain the appeal,” and permits issuance of a COA only where petitioner “has made a substantial showing of the denial of a constitutional right.” *Miller-El*, 537 U.S. at 336 (citing *Slack*, 529 U.S. at 482–83; 28 U.S.C. § 2253(c)(2)); *see also* *Buck*, 137 S. Ct. at 773–74 (reiterating that appellate court should limit examination on COA to “threshold inquiry” into the merits). This standard “includes showing that reasonable jurists could debate that the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Slack*, 529 U.S. at 484 (internal quotation marks and citation omitted); *cf. Harrington*, 562 U.S. at 101 (2011) (“A state court’s determination that the claim lacks merit precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on the correctness of the state court’s decision.”) (citation omitted)).

The Fifth Circuit not only cited, but applied, the proper standard when denying Russell’s COA request, limiting its review to no more than a “threshold inquiry” into the merits of Russell’s *Strickland*³ claim. The court stated, “[w]hen the district court rejects constitutional claims on the merits, this court conducts a threshold inquiry and issues a COA if ‘reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.’

³ *Strickland v. Washington*, 466 U.S. 668 (1984).

This threshold inquiry does not require full consideration of the factual or legal bases supporting the claims.” Pet. App. 1 at 12 (citing *Miller-El*, 537 U.S. at 336, 338). The court then conducted this “threshold inquiry,” concluding that reasonable jurists would not debate the district court’s denial of Russell’s IATC punishment claim. Pet. App. 1 at 23–29.

In reaching this conclusion, the Fifth Circuit did not conduct the type of merits analysis of the IATC claim that this Court has suggested is inappropriate. Rather, the court noted that “[t]he district court discussed the state habeas court’s findings at length before engaging in its own analysis under the ‘doubly deferential’ standard created by *Strickland* and 28 U.S.C. § 2254(d) and finding no merit.” Pet. App. 1 at 24 (citations omitted). The court concluded that “Russell is unable to show that reasonable jurists would debate whether the state court’s denial of his claim was unreasonable.” Pet. App. at 26–27.

This case does not follow the same “troubling” pattern identified by the dissenting opinion in *Jordan v. Fisher*, 135 S. Ct. 2647, 2652 n.2 (2015) (Sotomayor, J., joined by Ginsburg and Kagan, JJ., dissenting from denial of certiorari). Specifically, the Fifth Circuit did not deny COA “after engaging in an extensive review of the merits of a habeas petitioner’s claims,” or deny COA over a dissenting opinion. *Jordan*, 135 S. Ct. at 2652 n.2; *cf. Buck*, 137 S. Ct. at 773 (explaining that the court denied COA after essentially deciding merits

and over two votes dissenting from the denial of rehearing en banc). As noted, the Fifth Circuit did not engage in an extensive review of Russell's claims. Indeed, the court did not hear oral argument, and the court's threshold inquiry on this issue covers only two pages of the opinion.⁴ Nor did any justice dissent from the decision. *See* Pet. App. 1.

In his pleading before this Court, Russell makes the blanket statement that "reasonable jurists could agree with Russell". Pet. at 36. Such conclusory statements are insufficient. Russell argues as follows:

In this cause, too, the Circuit panel in this issue was really deciding the issue on the merits. The Circuit panel put in a good effort[,] but in doing so it ventured into "full consideration" of the issue, contrary to *Buck*.

Buck reiterated the observation in *Miller-El* that "[w]hen a court of appeals sidesteps [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, it is in essence deciding an appeal without jurisdiction." *Id.*, at 336-337. That also is what happened in Russell's case.

Pet. at 37–38. However, Russell cannot point to anywhere that the Fifth Circuit overstepped its constraints and ventured into the improper realm of making a merits determination.

⁴ The Fifth Circuit's discussion of both of Russell's IATC at punishment claims comprised a total of approximately five and one-half pages. *See* Pet. App. 1 at 23–29.

After a brief recitation of the facts relevant to the issue, the Fifth Circuit concluded that “Russell is unable to show that reasonable jurists would debate whether the state court’s denial of his claim was unreasonable.” Pet. App. at 29. The brevity of the court’s analysis combined with its own statements regarding the basis of their decision clearly indicate that the court performed only the requisite “threshold inquiry” before denying COA.

In his briefing before the Fifth Circuit, Russell failed to demonstrate that fairminded jurists could debate the correctness of the state court’s denial of his writ of habeas corpus on his IATC claim at punishment related to future dangerousness. Therefore, the denial of a COA was proper.

II. The Fifth Circuit Properly Denied COA Because the District Court’s Denial of Russell’s Claim Was Not Debatable.

Before this Court, Russell again fails to demonstrate that he was entitled to a COA. Russell claims he received ineffective assistance at trial because his counsel failed to investigate and present evidence that Russell did not pose a future threat to society, specifically expert testimony on his likelihood of committing further violent acts.⁵

⁵ Russell’s complaint is that his trial attorneys did not employ an expert “to connect the dots” created by the lay testimony that was presented. Pet. at 24. Russell presents the report of Dr. Mark Cunningham as an example of the testimony “representative of what experts in the field could research before trial and then present at court.” Pet. at 22. However, Russell has acknowledged that Cunningham may not have been available to testify at Russell’s trial. *See* Pet. App. 1 at 25–27. This is a necessary factor as in order to prove prejudice Russell must demonstrate prejudice. Russell cannot show that he was prejudiced by counsel’s failure to employ

Under § 2254(d), “because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard.” *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). As such, “[e]stablishing that a state court’s application of *Strickland* was unreasonable . . . is all the more difficult. The standards created by *Strickland* and § 2254(d) are both ‘highly deferential,’ and when the two apply in tandem, review is ‘doubly’ so.” *Richter*, 562 U.S. at 105 (citations omitted).

“[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.” *Strickland*, 466 U.S. at 690–91. The reasonableness of an attorney’s investigation must be determined by considering not only the evidence already known to counsel, but also whether such evidence would lead a reasonable attorney to investigate further. *Wiggins v. Smith*, 539 U.S. 510, 526–27 (2003). At a minimum, counsel should interview potential witnesses

an expert who may have been wholly unavailable to testify. Further, Russell does not suggest any other experts were available to testify to similar statistics at the time. As uncalled witnesses are disfavored as a basis for an IATC claim generally, Russell’s failure to provide *any* evidence that *any* witness was available is fatal. *See Day v. Quarterman*, 566 F.3d 527, 538 (5th Cir. 2009) (“that complaints of uncalled witnesses are not favored in federal habeas corpus review because the presentation of testimonial evidence is a matter of trial strategy and because allegations of what a witness would have stated are largely speculative.”)

and independently investigate the facts and circumstances of the case. *Bryant v. Scott*, 28 F.3d 1411, 1415 (5th Cir. 1994).

“An applicant ‘who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of trial.’” *Gregory v. Thaler*, 601 F.3d 347, 352 (5th Cir. 2010) (quoting *United States v. Green*, 882 F.2d 999, 1003 (5th Cir. 1989)).

“*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing.” *Wiggins*, 539 U.S. at 533. “[R]easonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste.” *Rompilla v. Beard*, 545 U.S. 374, 383 (2005).

Regarding prejudice, it is not enough “to show that the errors had some conceivable effect on the outcome of the proceeding.” *Strickland*, 466 U.S. at 693. Rather, counsel’s errors must be “so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.* at 687. To make this determination, a reviewing court must “consider *all* the relevant evidence that the jury would have had before it if [the petitioner] had pursued a different path—not just the . . . evidence [the petitioner] could have presented, but also the . . . evidence that almost certainly would have come in with it.” *Wong v. Belmontes*, 558 U.S. 15, 20 (2009).

This IATC issue was raised and rejected by the state habeas court and the district court properly deferred to the state court findings. The district court concluded not only that “Russell failed to overcome the presumption afforded the state court findings, but that Russell did “not acknowledge the state court findings to which [the] Court must defer.” Pet. App. 2 at 43. Before the Fifth Circuit, and continuing to his briefing before this Court, Russell has continued to selectively ignore the state court findings.

Part of Russell’s argument focuses on one finding by the state habeas court. Russell takes issue with the state trial court’s finding that such evidence is not relevant.⁶ *See* Pet. at 31–33. However, as the Fifth Circuit pointed out “that was not the court’s only finding as to this issue.” Pet. App. 1 at 28. The state court also found, based on trial counsel’s affidavit, that counsel believed

⁶ Interestingly, Russell also argues that there are no state court findings on this issue. “The state habeas court’s decision must be contrary to, or an unreasonable application of, clearly established Federal law, as determined by this Court. By the terms of the statute, that limitation applies to a ‘decision.’ What is a ‘decision’ in this context? It is not just the ultimate state court order granting or denying relief, but rather must mean a conclusion made by the state habeas court as to a particular claim. If a state habeas court does not address a particular claim, then there has not a decision on the claim.” Pet. at 34. Russell’s argument is simply inaccurate.

First, as Russell notes in his argument about the relevancy finding, there *were* state court findings related to this issue. *See* Pet. at 31–33. Second, the statement is legally inaccurate. Even if a state court is silent as to the factual basis of its merits decision, that decision is still due deference. *See Harrington v. Richter*, 562 U.S. 86, 98 (2011) (“Where a state court’s decision is unaccompanied by an explanation, the habeas petitioner’s burden still must be met by showing there was no reasonable basis for the state court to deny relief. This is so whether or not the state court reveals which of the elements in a multipart claim it found insufficient, for § 2254(d) applies when a ‘claim,’ not a component of one, has been adjudicated.”)

evidence of Russell's life and background was more effective than studies of convicted murderers. The gist of Russell's argument, as supported by Cunningham's report, is that counsel should have done more, i.e., should have called an expert to contextualize the evidence presented, and to provide statistics, scientific data and general information.

Russell complains that "[t]he federal district judge's analysis was guided in part by the state habeas judge's finding, based on a 'credible affidavit of trial counsel Hayes,' that the driving force in the strategy regarding future dangerousness was a belief that 'specific evidence of [Russell's] life and background presented to the jury would be more effective than studies of convicted murderers' (Appendix Exhibit 2, p. 43)." Pet. at 28. However, the district judge followed the letter and spirit of the law by deferring to the state findings. *See* 28 U.S.C. 2254(d).

State trial counsel, based upon reasonable investigation, developed a trial strategy and diligently pursued it. As found by the state habeas court, with regard to the investigation, trial counsel interviewed witnesses; obtained discovery from the State; talked to Russell and his family numerous times, including about his life and background; and hired a mitigation expert. Based on this information trial counsel developed a punishment strategy that Russell was a good person who never had a chance. Testimony was elicited to support this theory including evidence on Russell's rearing in a very poor part of

Houston, his abandonment by his father, family history of criminal activity, poverty, and lack of proper parental supervision.

The theory of the case that trial counsel chooses to present falls squarely within the realm of trial strategy that requires such highly deferential review. Russell does not argue that trial counsel failed to present a future danger case. That Russell quibbles with his trial counsel's performance is nothing more than the type of second-guessing that *Strickland* cautions against. 466 U.S. at 689.

A basic tenet of federal habeas litigation is that that the petitioner is required to present evidence and argument supporting their claims, rather than expecting the Director to bear the burden. *See Richter*, 562 U.S. 104. However, Russell's argument before this Court is replete with complaints and speculation as to trial counsels' strategy and any potential prejudice resulting from failing to follow Russell's now-favored approach.

The question under *Wiggins* must be: How could trial counsel fairly compare the two evidentiary approaches, choosing lay witnesses over experts, without investigating what an expert actually could say and what scientific research an expert could present? There is no indication that defense counsel investigated the topic until a point was reached where further investigation would be unnecessary, as this Court's case law demands. Instead defense counsel seems to have relied on a preconceived bias.

A courtroom is like a farmer's market, in that the quality and quantity of the work done beforehand is evident from the apparent yield. What could the yield have been if trial counsel had

researched the topic of future dangerousness, or had obtained the assistance of someone like Dr. Cunningham to do so?

Pet. at 29.

Russell complains that trial counsel could not compare “the two evidentiary approaches, choosing lay witnesses over experts” because they failed to conduct a proper investigation. Pet. at 29. However, in the very next sentence, Russell then complains that trial counsel “relied on a preconceived bias” against experts such as Cunningham. Pet. at 29. To support this claim, Russell quoted a pre-trial motion filed by trial counsel requesting that the trial court find the death penalty unconstitutional. Pet. at 27. Therefore, Russell’s own briefing demonstrates that trial counsel was aware of the type of testimony available through experts such as Cunningham on the issue of future danger. Yet counsel made the strategic decision not to employ such an expert and instead focus on Russell’s life, background, and who he was as a person.

Furthermore, even assuming deficient performance, Russell cannot demonstrate that he was prejudiced. Even had trial counsel presented a Cunningham-like expert, there is no reason to believe that his sentence would have been different. Considering the totality of the evidence that the jury heard, studies of statistics could not have countered the evidence of Russell’s other violent crimes which included convictions for aggravated robbery and

assault for the Apple Tree incident, the shooting of a man, and the assault of another man over an undisclosed amount of money. Russell's previous behavior demonstrated a willingness to resort to violence for little or no reason. Impersonal testimony on prison violence statistics would have been a far less effective counter to the State's evidence of Russell's very personal tendency for violence than the defense employed by Russell's attorneys. Russell's complaints about his counsels' strategy do not alter the fact that it was a reasonable and informed strategy.

The district court, applying the doubly deferential standard afforded a state court adjudication, deferred to the state court findings under AEDPA. Reasonable jurists could not debate the district court's denial of this claim. Therefore, the Fifth Circuit's denial of a COA on the claim was proper.

III. No Compelling Reason Otherwise Exists to Grant Certiorari.

Finally, Russell claims that he is not requesting that this Court review a "simple application of well-settled law." Pet. at 17. Rather, he "emphasizes the paramount importance of the first special issue submitted under Texas law, concerning what is commonly called 'future dangerousness.'" *Id.* However, future dangerousness is not the issue that Russell requests this Court address. In fact, Russell himself notes that "all this Court really needs to decide at this time is whether a panel of the United States Court of Appeals for the Fifth Circuit applied the procedures for a COA." *Id.* Russell does not claim that the

Fifth Circuit applied the wrong precedent; he merely disagrees with the conclusion the Fifth Circuit reached after a proper application of that precedent. *Id.* at 35–39. Such a complaint does not merit this Court’s attention.

CONCLUSION

For all the reasons discussed above, the Court should deny Russell’s petition for a writ of certiorari.

Respectfully submitted,

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