(CAPITAL CASE)

No. 17-_____

In the
Supreme Court of the United States

ROBERT EARL BUTTS, JR.,

PETITIONER,

v.

WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON,

RESPONDENT.

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

PETITION FOR A WRIT OF CERTIORARI

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September 29, 2017

CAPITAL CASE

QUESTIONS PRESENTED

1. Whether a court unreasonably applies *Strickland v. Washington*, 466 U.S. 668 (1984), by measuring trial counsel's performance against the prevailing professional norms of a local judicial circuit where those practices deviated from prevailing national or state norms.

2. Whether a federal habeas court's decision that it "cannot and will not second guess trial counsel's strategic decision" is consistent with *Strickland*.

PARTIES TO THE PROCEEDING

Petitioner is Robert Earl Butts, who was Petitioner-Appellant below.

Respondent is the Warden of the Georgia Diagnostic and Classification Prison, who was the Respondent-Appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert Earl Butts, Jr., respectfully petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's opinion (Pet. App. 1) is reported at 850 F.3d 1201. The district court's opinion (Pet. App. 103) is unreported. The Supreme Court of Georgia's order denying Butts a Certificate of Probable Cause to Appeal the state trial court's denial of his state habeas petition (Pet. App. 246) is unreported. The state trial court's order denying Butts's state habeas petition (Pet. App. 247) is unreported.

JURISDICTION

The Court of Appeals for the Eleventh Circuit entered its judgment on March 9, 2017. Butts timely petitioned for reconsideration and reconsideration *en banc*. The Court of Appeals denied Butts's petition for reconsideration on May 2, 2017. (Pet. App. 341–43) On July 5, 2017, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including September 29, 2017. *See* No. 17A31.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves (1) U.S. Constitution, Amendment VI and (2) 28 U.S.C. § 2254(d). (Pet. App. 346)

INTRODUCTION

This case, governed by AEDPA, presents the following recurring questions arising out of *Strickland v. Washington*, 466 U.S. 668 (1984):

First, is it an unreasonable application of *Strickland* to assess counsel's performance against local practices that fall short of established national or state norms, including those reflected in American Bar Association guidelines and similar publications? At least five circuits have judged counsel's conduct against national standards. The Ninth and Tenth Circuits, meanwhile, have at times focused on the practices of an entire state, rather than a smaller jurisdictional unit within a state. Here, however, the state habeas court based key aspects of its decision on deficient performance on the practices only within the Ocmulgee state judicial circuit, which covers just five percent of Georgia's counties, and the Eleventh Circuit endorsed that framework.

Second, can courts effectively ignore *Strickland* and abandon their duty to assess the reasonableness of trial counsel's conduct by labeling trial counsel's actions "strategic"? Consistent with the language of *Strickland*, the Fourth, Eighth, and Tenth Circuits have expressly considered and rejected the notion that strategic decisions are wholly immune from

challenge. Additionally, five other circuits have indicated that a defendant can establish that unreasonable strategic decisions constituted deficient performance. The First Circuit has adopted a "patently unreasonable" test for ineffective-assistance claims arising out of strategic decisions, while several state courts have enforced a "manifestly unreasonable" standard. Here, however, the Eleventh Circuit concluded in a published opinion that it "cannot and will not second-guess" counsel's "strategic" decision, thus effectively creating circuit precedent that "strategic" decisions are *wholly immune from review*.

This Court should grant review to clarify the appropriate application of *Strickland*, eliminate the confusion among lower courts regarding these issues, and correct the Eleventh Circuit's errors.

STATEMENT OF FACTS

This case arises out of the homicide of Donovan Parks on March 28, 1996 in Milledgeville, Georgia. After an investigation, the State charged Petitioner and another individual, Marion Wilson, with malice murder, felony murder, and other counts. The State sought the death penalty.

The state court appointed Robert Westin as lead defense counsel and Cassandra Montford-Ford as second chair to represent Butts. Westin had never before served as the lead attorney in a capital case. Montford-Ford had never served in any capacity in a murder case. A paralegal, Cathy Crawford, assisted the two attorneys.

A. Counsel's Pre-Trial Investigation

No one on the defense team thought it their responsibility to conduct a mitigation investigation. As first chair, Westin affirmatively rejected the role of developing mitigating evidence, explaining that he "didn't do as much witness interviewing as [he] would have in the other cases" as second chair because lead counsel is "just an organizer." Pet. App. 351. But Westin failed to delegate the mitigation task to his second chair, Montford-Ford, or to the paralegal Crawford. In fact, Westin could only speculate as to who *might* have conducted the mitigation investigation:

> Q. Who did the majority of interviewing witnesses on your defense team?
>
> A. It *would have been*, Cathy Crawford did a bunch of it. Cassandra [Montford-Ford], *I'm sure*, did. And *I'm not sure if we hired anybody else* to do that or not.

Pet. App. 351–52 (emphasis added). But Montford-Ford conducted *zero* pre-trial mitigation interviews and mistakenly believed paralegal Crawford was responsible for the entire mitigation investigation. *See* Doc. 13-15 at 49–52. Meanwhile, Crawford did not believe she was responsible for conducting a thorough and complete mitigation investigation on behalf of counsel, was not sure if anybody was assigned that role, and believed that there was a breakdown of communication among the defense team. *See* Pet. App. 362–63. Indeed, Crawford testified that she did not seek to obtain affidavits from potential mitigation witnesses because Westin

never asked her to do so. Doc. 13-26 at 134.

The lack of defined responsibilities was so debilitating that Crawford testified that "to this day I can't tell you what Cassandra Montford's focus was supposed to be." Pet. App. 362–63. The end result was that neither of Butts's attorneys conducted a meaningful mitigation investigation, and each simply assumed others would take care of it.

While Crawford interacted with some witnesses, counsel did almost nothing to develop a meaningful mitigation defense, except: (1) occasional discussions between the defense team and one of Petitioner's brothers and uncles, Pet. App. 286; (2) Crawford allegedly visiting Petitioner's home and talking to both of Petitioner's brothers and Tameica Butts, his sister, *id.*; (3) Crawford once briefly speaking to an "intoxicated" Ernest Waller, Butts's uncle, Pet. App. 38; (4) a few alleged discussions between Butts's mother, Laura, and Crawford, Pet. App. 285; and (5) one five-to-ten-minute meeting between Laura Butts, her mother, and Westin, Doc. 13-6 at 123.

A slew of potential witnesses who should have been thoroughly interviewed in the mitigation investigation testified in the state habeas proceedings that they were never contacted by *anyone* from the defense team before the trial, and would have testified at trial had they been asked. *See* Doc. 13-4 at 74–75 (Tammy Mosley, sister); Doc. 13-6 at 89–90 (Johnny Waller, uncle); Doc. 13-4 at 30 (Harold Burton, live-in boyfriend of Laura Butts for six years of Robert's youth); Doc. 13-4 at 48 (Tracy Burton, sister-in-law of Harold Burton and Robert's acquaintance); Doc. 13-4 at 3–4 (Henrietta Taylor,

Robert's teacher); Doc. 13-4 at 12–13 (Lois Reeves, Robert's teacher); Doc. 13-6 at 58 (Tameica Butts, Robert's sister). Defense counsel also never retained or consulted with a mitigation expert, who could have assisted in conducting a mitigation investigation—by interviewing siblings, relatives, coaches, counselors, or friends that counsel never contacted—and developing a mitigation strategy.

Trial counsel's failure to conduct a meaningful mitigation investigation, exacerbated by the failure to hire a mitigation expert, was all the more egregious because it meant no one followed up on the numerous "red flags" in the records that were obtained. Those records—including Butts's school records and documents regarding Butts's mother's substance abuse treatment—revealed many details that should have prompted additional investigation and a greater focus on Butts's background. In a case like this one, with disparate but compelling strands of mitigation, it was vitally important for trial counsel to consult with or retain a mitigation expert who could weave the different strands of mitigation together into a compelling portrait of the defendant that would have influenced the jury's appraisal of his moral culpability. Failure to do so was deficient performance and prejudiced Butts because, as explained below, it meant his counsel was unprepared and unable to call any witnesses to meaningfully rebut the day-long onslaught of aggravating evidence offered by the state during the trial's penalty phase.

B. Petitioner's Trial and Direct Appeal

On November 20, 1998, Petitioner was convicted

in Georgia state court of the malice murder of Donovan Parks, felony murder, armed robbery, hijacking a motor vehicle, possession of a firearm during the commission of a crime, and possession of a sawed-off shotgun. Doc. 10-5 at 15. During the guilt-innocence phase of the trial, Butts testified and admitted, among other things, his involvement in robbing Parks, stealing Parks's car, and being present when Parks was murdered. Doc. 10-2 at 119–24. Two other witnesses testified that Butts confessed to them that he was the triggerman. Doc. 9-14 at 42–43, 99–102. Trial counsel's primary theme during this phase was that Wilson had been both the mastermind and triggerman. Doc. 13-1 at 80. After a five-day trial, the jury needed just 65 minutes of deliberations to convict Butts of all six counts. Doc. 10-7 at 106–07.

During the trial's penalty phase, the prosecution called 15 witnesses offering aggravating evidence. Despite the damning admissions by Butts, the speed of the jury's guilty verdicts, which plainly reflected they had already rejected any sort of "residual doubt" as it related to Butts's involvement in the murder, and the nature of the prosecution's penalty-phase case, trial counsel offered no mitigation evidence to humanize Butts in response. Counsel instead relied exclusively on "residual doubt" to try to spare Butts's life—a decision that was dictated entirely by counsel's failure to reasonably investigate and develop a mitigation strategy. Unsurprisingly, the jury that convicted Butts of six counts in 65 minutes was unconvinced and quickly returned a death sentence. Doc. 10-7 at 138. Concluding that the jury's sentence made it "mandatory upon this

Court as a matter of law" to do so, the judge ordered that Butts be executed. Doc. 10-7 at 147.

Butts then moved for a new trial. Doc. 10-11. The trial court denied the motion, and Butts appealed. Doc. 8-1 at 6–7. In Butts's opening appellate brief, appellate counsel raised various claims of ineffective assistance of trial counsel, including claims based on trial counsel's failure to call family members as witnesses during the penalty phase to elicit mitigating evidence. Doc. 10-13 at 1, 37–49, 60. Butts's appellate counsel, however, conducted no new mitigation investigation, nor did appellate counsel hire a mitigation expert, to establish what testimony trial counsel should have elicited during the trial's penalty phase. Pet. App. 271. The case was remanded, and, after an evidentiary hearing, the trial court denied relief. Doc. 10-17 at 14. Butts's direct appeal resumed, and the Supreme Court of Georgia affirmed Butts's convictions and death sentence. *Butts v. State*, 546 S.E.2d 472 (Ga. 2001). This Court denied Butts's petition for a writ of certiorari on direct review, *Butts v. Georgia*, 534 U.S. 1086 (2002), and his petition for rehearing, *Butts v. Georgia*, 535 U.S. 922 (2002).

C. Petitioner's State Habeas Proceedings

Butts thereafter sought state habeas relief, raising ineffective-trial-counsel and ineffective-appellate-counsel claims. Among other things, Butts argued that trial counsel was ineffective for failing to conduct an adequate mitigation investigation, for failing to hire a mitigation expert, and for failing to introduce any mitigation evidence during the trial's

sentencing phase. *See* Pet. App. 268–74. The state habeas court held a three-day evidentiary hearing on these issues in September 2007.

In support of his ineffective-assistance-of-counsel claims, Butts relied on the 1989 American Bar Association Guidelines for the Appointment and Representation of Capital Defendants ("ABA Guidelines") and the Southern Center for Human Rights Defense Manual ("Southern Center Manual"). Butts contended that those publications—which explained that counsel had an obligation to discover *all reasonably available mitigation evidence*, consider hiring a mitigation expert, and introduce mitigation evidence at trial—reflected the prevailing professional norms at the time of trial. Indeed, during the state habeas proceedings, lead trial counsel Westin testified that he personally relied on the ABA death-penalty guidelines and the Southern Center Manual at the time of trial, and that he considered the ABA death-penalty guidelines to be "*The Bible*" for capital defense counsel. Pet. App. 359–60.

Butts also offered witness and affidavit testimony, including from numerous family members, friends, acquaintances and teachers, as well as testimony from a mitigation expert, Jan Vogelsang, to prove up the type of mitigation evidence trial counsel failed to discover and present at trial.

Vogelsang's testimony provided a detailed biopsychosocial, multi-generational assessment of Butts and his family, which would have provided the jury with critical insight into Butts's life. Rather

than merely presenting discrete mitigation evidence, Vogelsang weaved together evidence of Butts's upbringing to explain how his environment presented insurmountable obstacles to normal development. *See* Doc. 13-4 at 108–10. Vogelsang explained that four background factors operated in conjunction to deprive Butts of a stable foundation as a youth and teen: (1) "a father who was seriously mentally ill, with over 30 admissions to a mental hospital," and who was "in and out of jail, sometimes homeless, sometimes in halfway houses"; (2) "a crack-addicted mother, whose addiction was chronic and severe and lasted over time . . . and who would disappear for days and weeks at a time, essentially leaving both parents ineffective to take care of their children"; (3) Butts "being left by the time he was nine or ten years old as the primary caretaker of a younger brother who was diagnosed as severely mentally disturbed"; and (4) the "series of violent and drug abusing men who were in and out of [Butts's] home, . . . most of whom were drug users." Pet. App. 356–57. The jury that sentenced Butts to death heard none of this evidence.

Unlike trial counsel, Vogelsang readily provided a complete picture of Butts by interviewing family members, friends, and teachers; reviewing medical, educational, social services, and criminal records; and interviewing most of these contacts in the Milledgeville community where Butts lived. *See, e.g.*, Doc. 13-4 at 116–34; Doc. 13-5 at 1–42. She illustrated a number of Petitioner's positive traits, including his willingness to learn and his care of his siblings, and explained that he was a child of great potential. Doc. 13-5 at 37.

On April 7, 2011, the state habeas court denied Butts's petition. Pet. App. 247. The state court found that Butts's ineffective-trial-counsel claims—based on trial counsel's failure to conduct an adequate mitigation investigation and failure to present mitigation evidence—were procedurally defaulted because Butts did not raise them on direct appeal. Pet. App. 253–59. However, in conducting a cause-and-prejudice analysis to determine if the default could be excused, the state habeas court considered Butts's ineffective-appellate-counsel claim based on appellate counsel's failure to conduct an independent mitigation investigation. The state habeas court held that appellate counsel was deficient, but that Butts could not establish prejudice because appellate counsel would not have been able to establish that trial counsel's performance was deficient. Reviewing trial counsel's performance through this lens, the state habeas court acknowledged "it appears unclear as to which member of the defense team was primarily responsible for the pretrial mitigation investigation" but concluded that the investigation was reasonable. Pet. App. 281. The state habeas court also concluded that trial counsel did not render ineffective assistance by failing to introduce any mitigation evidence at sentencing because "[t]rial counsel made the strategic decision not to present evidence of Petitioner's dysfunctional background." *Id.* With regard to the failure to hire a mitigation expert, the state habeas court sidestepped the mandates of *Strickland* by ignoring trial counsel's testimony that the ABA death-penalty guidelines were "*The Bible*" for capital defense counsel and instead focusing on trial counsel's self-serving testimony that "it was not

common practice in the Ocmulgee Judicial Circuit to hire mitigation experts." Pet. App. 298–99.

On July 15, 2011, Butts filed an Application for Certificate of Probable Cause to Appeal the Superior Court's denial of his petition (the "Application"). Doc. 16-25. The Supreme Court of Georgia denied the Application. Doc. 16-28 at 1.

D. Petitioner's Federal Habeas Proceedings

Butts filed a habeas petition in the United States District Court for the Middle District of Georgia on May 30, 2013. Doc. 1. The district court denied relief and denied Butts's motion to alter or amend the judgment. Pet. App. 103; Pet. App. 345; Pet. App. 332. The district court "looked through" the one sentence denial by the Supreme Court of Georgia and instead focused on the reasoned opinion of the state habeas court. The district court found the state habeas court's determinations regarding deficient performance and prejudice of trial and appellate counsel were not unreasonable. Pet. App. 138–39, 152–54, 160–62, 181–82, 190–91. Butts timely appealed. Doc. 38.

On March 9, 2017, the Court of Appeals for the Eleventh Circuit affirmed the district court's judgment. The Eleventh Circuit issued a 15-page opinion and further adopted and incorporated the majority of the district court's opinion,[1] which it

[1] At the time the district court denied Butts's § 2254 petition, the appeal of Butts's co-defendant, Marion Wilson, was pending with the *en banc* Eleventh Circuit. *See Wilson v. Warden*, 834 F.3d 1227 (11th Cir. 2016). The issue in *Wilson* was whether federal courts should "look through" the Supreme Court of

attached as an appendix to its own opinion. *See Butts v. GDCP Warden*, 850 F.3d 1201, 1205 (11th Cir. 2017). Despite lead trial counsel Westin's testimony that he personally relied on the ABA death-penalty guidelines and the Southern Center Manual and considered the ABA death-penalty guidelines to be "*The Bible*" for capital defense counsel, the Eleventh Circuit held that the two publications did not reflect prevailing professional norms in the judicial circuit where the case was tried. *Id.* at 1206. Thus, the Eleventh Circuit effectively concluded that trial counsel's failure to adhere to the standards found in those publications—including the guidance regarding hiring a mitigation expert and to introduce mitigation evidence at sentencing—did not reflect a deviation from prevailing professional norms. *Id.* at 1206–07. Rather than relying on any professional standards, national practices, or state norms, the Court of Appeals instead concluded that the failure to hire a mitigation expert did not constitute deficient performance simply because "mitigation experts were not routinely used in capital cases *in the judicial circuit where this case was tried*." *Id.* at 1207 (emphasis added).

Georgia's denial of a certificate of probable cause and evaluate the habeas trial court's reasoned decision. In this case, the district court predicted that the Eleventh Circuit in *Wilson* would "look through" to the last reasoned decision. *See* Doc. 34 at 12 n.8. The Eleventh Circuit, however, did not do so, *see Wilson*, 834 F.3d at 1235–37, and expressly rejected the district court's prediction in this case, *see Butts*, 850 F.3d at 1205 n.2. This Court has granted certiorari in *Wilson v. Warden*. *See* Case *Wilson v. Sellers*, 137 S. Ct. 1203 (2017) (No. 16-6855).

The Court of Appeals also refused to even consider the merits of Butts's argument that trial counsel performed unreasonably by pursuing a sentencing-phase strategy of "residual doubt" alone given the facts and circumstances of the case, including the fact that the jury convicted Butts of malice murder, felony murder, and four other counts in merely 65 minutes after a lengthy trial. *Id.* at 1207–08. The Eleventh Circuit effectively held that such a strategic decision is *wholly immune* from challenge, stating that it "cannot and will not second guess trial counsel's strategic decision to focus on residual doubt instead of mitigation evidence . . . ." *Id.* at 1208. The Court of Appeals thus chose not to evaluate at all the state habeas court's conclusion that trial counsel's alleged strategic decision was reasonable. *See id.* Although the district court rejected Butts's contention that the state habeas court unreasonably concluded that he was not prejudiced by trial counsel's deficient performance, the Court of Appeals did not independently address that argument.

Butts petitioned for rehearing, but the Eleventh Circuit entered an order denying the petition on May 2, 2017. On July 5, 2017, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including September 29, 2017. *See* No. 17A31.

REASONS FOR GRANTING THE PETITION

I. COURTS ARE SPLIT ON HOW TO ASSESS PREVAILING PROFESSIONAL NORMS, AND ON THE RELEVANCE OF ABA GUIDELINES

Strickland commands that the "proper measure of attorney performance" is "reasonableness under prevailing professional norms." 466 U.S. at 688. However, courts have differed in identifying and applying the prevailing professional norms when local standards deviate from prevailing state or national standards. In this situation, should courts rely on prevailing *national* norms, prevailing *state* norms, or prevailing norms in an even smaller, local geographic unit?

This issue is recurring in the state and federal courts, and the decision of the Eleventh Circuit below conflicts with the decisions of numerous circuits and state supreme courts.

A. The Decision Below Was Incorrect

The Court of Appeals below erred in concluding that the state habeas court's analysis of prevailing professional norms did not constitute an unreasonable application of *Strickland* and its progeny. Butts argued below, and argues here, that it is unreasonable for a habeas court to ignore prevailing national standards—here, standards reflected in the ABA guidelines and Southern Center manual—in favor of local standards that sanction capital-case advocacy less rigorous than that contemplated by *Strickland*. If the decision below is

allowed to stand, the bar for deficient performance could vary drastically from state to state, county to county, and even city to city.

In *Strickland*, this Court held that a defendant asserting ineffective assistance of counsel must establish "that counsel's representation fell below an objective standard of reasonableness." 466 U.S. at 688. "The proper measure of attorney performance," the Court held, is "reasonableness under prevailing professional norms." *Id.* *Strickland* confirmed that "a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690.

Strickland instructed courts on how they should assess the reasonableness of trial counsel's performance, including by explaining the relevance of ABA guidelines and similar publications. *Strickland* expressly contemplated using national ABA guidelines in determining whether counsel performed deficiently. The *Strickland* Court explained that "[p]revailing norms of practice as reflected in American Bar Association standards and the like are guides to determining what is reasonable." *Id.* at 688 (citation omitted). Of course, "they are only guides." *Id.* The *Strickland* Court further noted that "the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Id.* at 690.

Strickland thus provides the framework for courts to assess counsel's allegedly deficient conduct: counsel's conduct is judged against the prevailing professional norms, as determined from the "facts of the particular case" at "the time of counsel's conduct," and the ABA guidelines and similar publications are guides for determining what constitutes reasonable conduct. *Id.* at 688–90. As detailed below, this Court's more recent cases have confirmed this framework. The Court of Appeals below erred—and the state habeas court unreasonably applied *Strickland* and its progeny—when analyzing the prevailing professional norms in this case.

The state habeas court unreasonably applied *Strickland* and its progeny by failing to consider the 1989 ABA Guidelines and the Southern Center Manual as evidence of the prevailing professional norms at the time of trial. This is especially true because the "facts of the particular case"—namely, lead trial counsel's uncontroverted testimony during the state habeas proceedings, establish that at "the time of counsel's conduct," trial counsel relied on the publications as a guide for proper conduct, lead counsel considered the 1989 ABA Guidelines to be "*The Bible*" for capital defense counsel, and the Supreme Court of Georgia had confirmed the two publications' status as establishing applicable prevailing professional norms in the state. Accordingly, the state habeas court unreasonably applied *Strickland* by failing to consider them, and the Eleventh Circuit erred in rejecting their relevance.

Instead, the state habeas court unreasonably applied *Strickland* by applying a test for prevailing professional norms that focused on the eight-county state judicial district in which Butts's trial took place as the relevant geographic scope for identifying what professional norms were "prevailing" at the time of trial. This holding would sanction local practice overruling prevailing national or state norms for representing defendants—even if those local practices fall below national norms, such as in this case where the court concluded that local practice did not require the retention of a mitigation expert based on the anecdotal and geographically limited experience of the local prosecutor and lead defense counsel. This Court should correct the Eleventh Circuit's error. Otherwise, a criminal defendant's federal constitutional protections will vary from town to town based on the preferred practices of the local lawyers.

B. Courts Are Split on Whether to Consider Prevailing *Local* Norms, Prevailing *State* Norms, or Prevailing *National* Norms

1. Background

Since *Strickland*, this Court has returned to the issue of ABA guidelines and similar national practice standards many times. In *Williams v. Taylor*, 529 U.S. 362 (2000), this Court cited an ABA publication to support its holding that "trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background." *Id.* at 396 (citing 1 ABA Standards for Criminal Justice 4–4.1, commentary, p. 4–55 (2d ed. 1980)).

In *Wiggins v. Smith*, 539 U.S. 510 (2003), this Court repeatedly measured counsel's conduct against ABA guidelines and held that counsel "fell short of the standards for capital defense work articulated by the American Bar Association (ABA)." *Id.* at 524. This Court thus found that counsel performed unreasonably. *Id.* at 534. Likewise, in *Rompilla v. Beard*, 545 U.S. 374 (2005), this Court held that trial counsel's performance was deficient based on counsel's failure to obtain the information required by the ABA Standards for Criminal Justice. *See id.* at 385–90.

In 2009, this Court decided *Bobby v. Van Hook*, 558 U.S. 4 (2009). In *Bobby*, this Court reversed the judgment of the Sixth Circuit, concluding that the circuit court improperly "treated the ABA's 2003 Guidelines not merely as evidence of what reasonably diligent attorneys would do, but as inexorable commands with which all capital defense counsel must fully comply." *Id.* at 8 (internal quotation marks omitted).

In this case, the Court of Appeals below relied on *Bobby* to seemingly reject the relevance of the 1989 ABA Guidelines and Southern Center Manual altogether, instead applying a local standard. But *Bobby* did not overturn *Strickland*'s holding that courts consider ABA and other guidelines where appropriate. And *Bobby* certainly did not authorize courts to rely on local standards that fall below state or national standards.

2. Local Standards versus State or National Standards

Although *Strickland* did not expressly hold that a national standard applied, *Strickland* contemplated the relevance of *national* professional norms by identifying "norms of practice as reflected in American Bar Association standards" as "guides to determining what is reasonable." 466 U.S. at 688. Recent cases, including *Wiggins*, do not alter the conclusion that *Strickland* contemplated national norms.

Since *Strickland*, this Court has considered the prevailing norms in a smaller geographic region. *See Wiggins*, 539 U.S. at 524 (holding that "[c]ounsel's decision not to expand their investigation beyond the PSI and the DSS records fell short of the professional standards that prevailed in Maryland in 1989."); *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011) (noting that the record in that case did not include evidence that trial counsel's actions were inconsistent either with the norms of the locality of trial (Los Angeles) or with the norms of the state of trial (California)). However, the Court has never held that a local bar or judicial circuit could effectively opt out of or ignore prevailing national norms or state norms by creating a lesser standard for constitutionally adequate performance.

Indeed, the Tenth Circuit recently noted that this Court has never endorsed the principle that courts properly apply *Strickland* by relying on state or local practices that diverge from national practices. *See Heard v. Addison*, 728 F.3d 1170, 1181 (10th Cir. 2013).

3. Prevailing *National* Norms

The Third Circuit has repeatedly judged trial counsel's conduct against prevailing *national* norms. In *Outten*, the Third Circuit held that trial counsel performed deficiently in failing to conduct an adequate mitigation investigation. *Outten v. Kearney*, 464 F.3d 401, 418–19 (3d Cir. 2006). Specifically, the Third Circuit held that counsel's "effort fell well short of the *national* prevailing professional standards articulated by the American Bar Association and was, therefore, unreasonable." *Id.* at 418 (emphasis added). Likewise, in *Marshall v. Cathel*, 428 F.3d 452 (3d Cir. 2005), *cert. denied*, 547 U.S. 1035 (2006), the Third Circuit held that counsel's conduct fell short of prevailing professional norms as established by both national norms (based on ABA guidelines) and statewide norms. *Id.* at 463.

Other circuits have referenced ABA guidelines and other similar national practice standards without expressly considering whether the standards reflected prevailing *national* norms, prevailing *state* norms, or prevailing norms of a different jurisdictional unit. *See, e.g.*, *United States v. Fields*, 761 F.3d 443 (5th Cir. 2014); *Hamblin v. Mitchell*, 354 F.3d 482, 486–88 (6th Cir. 2003), *cert. denied*, 543 U.S. 925 (2004); *Woolley v. Rednour*, 702 F.3d 411, 425 (7th Cir. 2012); *Littlejohn v. Trammell*, 704 F.3d 817 (10th Cir. 2013).

4. Prevailing *State* Norms

The Ninth Circuit on several occasions has relied on national guidelines published by the ABA without expressly considering whether they reflect state or

local norms. *See Doe v. Ayers*, 782 F.3d 425, 434–35 (9th Cir. 2015); *Robinson v. Schriro*, 595 F.3d 1086, 1108 (9th Cir. 2010), *cert. denied sub nom. Ryan v. Robinson*, 562 U.S. 1037 (2010). In a recent decision, however, the Ninth Circuit focused on whether counsel's actions conformed to state-specific norms of practice. *See Visciotti v. Martel*, 862 F.3d 749 (9th Cir. 2016). In *Visciotti*, the Ninth Circuit reviewed whether counsel's actions conformed to practice norms in California between 1980 and 1990 and concluded that counsel's failure to object to the closure of voir dire was not unreasonable. *Id.* at 771–72 & n.14.

For its part, the Supreme Court of Georgia—like numerous Courts of Appeal and state Supreme Courts[2]—has continued to approve the use of national ABA guidelines and the Southern Center Manual to identify the applicable prevailing professional norms. In the pre-*Bobby* case *Hall v. McPherson*, 663 S.E.2d 659 (Ga. 2008), the Supreme Court of Georgia held that the trial court did not err by relying on ABA guidelines and the Southern Center Manual to conclude that trial counsel performed deficiently. *Id.* at 661. The court described these professional guides as reflecting "the standard practice of the jurisdiction at the time." *Id.* at 661 n. 6 (quoting *Franks v. State*, 599 S.E.2d 134, 147 (Ga. 2004)). More recently, and post-*Bobby*, in

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[2] *See Showers v. Beard*, 635 F.3d 625, 633 (3d Cir. 2011); *Fields*, 761 F.3d at 456; *Foust v. Houk*, 655 F.3d 524, 534 (6th Cir. 2011); *Robinson*, 595 F.3d at 1108; *Littlejohn,* 704 F.3d at 859; *Canape v. State*, No. 62843, 2016 WL 2957130, *3 (Nev. May 19, 2016); *State v. Herring*, 28 N.E.3d 1217, 1233 (Ohio 2014).

Chatman v. Walker, 773 S.E.2d 192 (Ga. 2015), the court rejected the State's contention that the state habeas court "wrongly appropriated" ABA guidelines in concluding that trial counsel was deficient. *Id.* at 200. The court found "no merit to the Warden's argument that the habeas court erred as a matter of law by relying upon the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases." *Id.*

5. The Court of Appeals' Decision Below Conflicts with Circuit and State Supreme Court Decisions

By judging counsel's performance against the practices of individuals in a small judicial circuit within the state of Georgia—and in the process not considering whether, given the facts of the case, national or state norms counseled in favor of the retention of a mitigation expert in this case—the Court of Appeals' decision below conflicts with those courts that judge counsel's actions against *national* professional norms. *See, e.g.*, *Outten*, 464 F.3d at 418–19; *Marshall* , 428 F.3d at 463.

Indeed, the Court of Appeals' narrow focus on the Ocmulgee Judicial Circuit even conflicts with those courts that have judged counsel's performance against *statewide* professional norms. *See Ayers*, 782 F.3d at 434-35; *Robinson*, 595 F.3d at 1108; *Visciotti*, 862 F.3d at 771–72 & n.14.; *Hall*, 663 S.E.2d at 661.

C. The Question of How to Identify Prevailing Professional Norms Is of Exceptional Importance

The question of how to identify and apply the prevailing professional norms against which to measure counsel's performance—including whether courts should consider national, state, or local norms—is a fundamental one that this Court should resolve as soon as possible.

This question recurs frequently. This Court has repeatedly relied upon—or rejected reliance upon—national standards as embodied by the ABA guidelines or similar manuals in recent cases. *See Missouri v. Frye*, 566 U.S. 133, 145 (2012); *Pinholster*, 563 U.S. at 196; *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010); *Bobby*, 558 U.S. at 7; *Rompilla*, 545 U.S. at 387; *Wiggins*, 539 U.S. at 522–24; *Williams*, 529 U.S. at 396; *see also Chaidez v. United States*, 568 U.S. 342, 362 (2013) (Sotomayor, J., dissenting). Moreover, as demonstrated by the slate of circuit and state court cases cited above, the issues of the relevance of ABA guidelines and the proper scope for assessing prevailing professional norms arise frequently in the lower federal courts and state courts.

Resolution of this question is crucially important, especially because federal and state courts consider thousands of ineffective-assistance-of-counsel claims every year, dozens of which involve defendants or courts citing or relying on national standards as embodied by the ABA or similar guidelines.[3] Courts

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[3] A WestlawNext search for "ineffective assistance" &

need clarity on whether they unreasonably apply *Strickland* by assessing counsel's performance against local practice that conflicts with national norms such as those identified in ABA guidelines.

D. This Case Is an Ideal Vehicle for the Court to Resolve the Issue

This case is an ideal opportunity for the Court to affirm that *Strickland* requires courts to assess counsel's conduct against prevailing national norms, even if local practice differs from those standards, and that courts should consider ABA guidelines and similar manuals as guides in assessing those norms.

Trial counsel here failed to conform their conduct to national—and state—norms in three significant ways. First, trial counsel's failure to hire a mitigation expert was unreasonable under the circumstances presented at trial and in light of the prevailing professional norms set out in the 1989 ABA Guidelines and Southern Center Manual. The Southern Center Manual reflected the prevailing professional understanding that a social worker or other mitigation expert should "be a specialist in mitigation development with experience in developing facts related to defendants' backgrounds and medical and mental health histories." Southern Center Manual, Ch. 3, p. 1. Similarly, the 1989 ABA Guidelines stressed that "[t]he assistance of one or more experts (e.g., social worker, psychologist, psychiatrist, investigator, etc.) may be determinative as to the outcome" of the sentencing phase. 1989

Strickland & (("American Bar Association" or "ABA") /7 guide!) produces 108 federal and state orders and opinions issued since September 29, 2015.

ABA Guidelines, Guideline 11.8.6, Commentary. Trial counsel's decision to ignore these professional norms was unreasonable since the evidence of guilt was overwhelming and trial counsel knew that the prosecution was prepared to put on extensive aggravation evidence because he attended much of Wilson's trial in preparation for Butts's trial. *See* Doc. 13-21 at 69.

Second, trial counsel performed deficiently by failing to "discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." 1989 ABA Guidelines, Guideline 11.4.1(C). Among other things, trial counsel failed to contact and interview witnesses who could have testified about Butts's exceedingly difficult upbringing, marked by, inter alia, (1) his mother's substance abuse (e.g., Doc. 13-6 at 112–13) and repeated absences from the home (Doc. 13-6 at 107–09; Doc. 13-13 at 77); (2) the absence of his severely mentally-ill father (Doc. 13-4 at 108–10); (3) his responsibility for caring for a brother with a severe behavioral disorder who "was seen as one of the most difficult children to ever be assessed at the Medical College of Georgia" (Doc. 13-5 at 2); (4) his older sister fleeing the dysfunctional home around age 14 to live with a grandparent (Doc. 13-4 at 70–72); and (5) his mother's boyfriend forcing Butts to threaten another individual at gunpoint (Doc. 13-5 at 1). Specifically, trial counsel failed to interview Butts's older sister (Doc. 13-4 at 74–75), who fled the home and could have offered a powerful account of Butts's miserable upbringing. Counsel also failed to interview Butts's closest uncle, Johnny Waller, who

could have testified about Butts's mother's repeated absences and substance abuse. Doc. 13-6 at 89–90. Nor did counsel interview the only individual who ever approximated a father figure for Butts—Harold Burton, his mother's longest live-in boyfriend. Doc. 13-4 at 30. Counsel also failed to interview any of Butts's teachers, who could have offered compelling testimony about Butts's potential as a young man. All were known, available, and willing to testify. Whether these failures were caused by a lack of personnel to conduct these interviews, a failure to assign someone to be responsible for these interviews, or a failure to appreciate this work needed to be done, the result is the same: constitutionally deficient performance.

Third, trial counsel performed deficiently by failing to introduce *any* humanizing mitigation evidence during the penalty phase of Petitioner's trial. As reflected in the 1989 ABA Guidelines, prevailing professional norms required counsel to present at sentencing "all reasonably available evidence in mitigation unless there are strong strategic reasons to forego some portion of such evidence." 1989 ABA Guidelines, Guideline 11.8.6(A). Here, there were no strong strategic reasons to forego introducing any portion of the available mitigation evidence, let alone all of that evidence. Indeed, there was no "strategic" reason not to present mitigation evidence *in addition to* arguing residual doubt. *See, e.g.*, *Williams v. Roper*, 695 F.3d 825, 850 (8th Cir. 2012) (rejecting "the assumption that the mitigation evidence would 'defy' or be 'inconsistent with' the [residual doubt] strategy employed" by counsel); *Sallahdin v. Gibson*, 275 F.3d

1211, 1240 n.10 (10th Cir. 2002) (explaining that counsel introduced mitigation evidence consistent with the concurrent strategy of residual doubt).

However, rather than apply these prevailing national norms as reflected in the ABA guidelines, the state habeas court instead deferred to a local practice that fell short of the national—and state—standards, crediting testimony, for example, that it was not common practice in that district to hire a mitigation expert in the local judicial circuit.

Thus, this case squarely presents the issue of whether courts must address national, state, or local professional norms. Particularly with regard to the failure to retain a mitigation expert, the state habeas court staked out—and the Eleventh Circuit below adopted—the extreme position that it will compare counsel's performance against only the practices of other lawyers in the local judicial circuit. Review of this issue will allow this Court to plainly articulate whether national, state, or local practices govern ineffective-assistance claims.

II. BY DECIDING THAT IT "CANNOT AND WILL NOT SECOND GUESS" TRIAL COUNSEL'S "STRATEGIC" DECISION, THE COURT OF APPEALS EFFECTIVELY IGNORED *STRICKLAND* AND PUT ITSELF IN CONFLICT WITH THE DECISIONS OF NUMEROUS OTHER CIRCUITS

A. The Eleventh Circuit's Decision Creates a Circuit Split on Whether and When Strategic Decisions Can Constitute Deficient Performance

Strickland instructed lower courts that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." 466 U.S. at 690.

The Fourth, Eighth, and Tenth Circuits have expressly considered and rejected the notion that strategic decisions are wholly immune from challenge. For example, in *United States v. Chapman*, 593 F.3d 365 (4th Cir. 2010), the Fourth Circuit unambiguously explained that "[t]he reasonableness of the tactical decision actually made by counsel is of course subject to challenge." *Id.* at 369.[4] And in *United States v. Villalpando*, 259 F.3d 934 (8th Cir. 2001), the Eighth Circuit held that "[s]ome strategy decisions . . . are so unreasonable that they can support a claim of ineffective assistance of counsel." *Id.* at 939. Likewise, the

[4] In an unpublished decision, the Fourth Circuit stated that, "[t]o be sure, this language [in *Strickland*] making strategic decisions by counsel 'virtually unchallengeable,' does leave room for such decisions to still be successfully challenged." *Boseman v. Bazzle*, 364 F. App'x 796, 805 (4th Cir. 2010).

Tenth Circuit in *Bullock v. Carver*, 297 F.3d 1036 (10th Cir. 2002), noted that "even where an attorney pursued a particular course of action for strategic reasons, courts still consider whether that course of action was objectively reasonable, notwithstanding *Strickland*'s strong presumption in favor of upholding strategic decisions." *Id.* at 1048.

Numerous other circuits have agreed with this framework. *See Phoenix v. Matesanz*, 233 F.3d 77, 82 n.2 (1st Cir. 2000) ("We should note that '*virtually* unchallengeable' does differ from 'unchallengeable.'"); *Thomas v. Varner*, 428 F.3d 491, 499–500 (3d Cir. 2005) ("At first, the presumption is that counsel's conduct might have been part of a sound strategy. The defendant can rebut this "weak" presumption . . . *by showing that the strategy employed was unsound*." (emphasis added)); *Beltran v. Cockrell*, 294 F.3d 730, 735 (5th Cir. 2002) ("Defense counsel's unreasonable strategic decisions and investigative failures amounted to ineffective assistance of counsel."); *Miller v. Webb*, 385 F.3d 666, 673 (6th Cir. 2004) ("The trial strategy itself must be objectively reasonable."); *Dixon v. Snyder*, 266 F.3d 693, 703 (7th Cir. 2001) ("[I]t would have been even more unreasonable for counsel to have made the decision not to cross Carlisle if he had been aware of the statute and equally unreasonable for the appellate court to have found it to be a reasonable strategic decision").

Even though courts generally agree that a defendant may challenge trial counsel's strategic decisions, courts diverge on the standard for succeeding on such a challenge. The First Circuit

has adopted a "patently unreasonable" test for ineffective-assistance claims arising out of strategy decisions. *See Phoenix*, 233 F.3d at 85. Several state courts, however, have enforced a "manifestly unreasonable" standard. *See Com. v. Kolenovic*, 32 N.E.3d 302, 311 (Mass. 2015); *State v. Thompson*, 20 A.3d 242, 260 (N.H. 2011); *Pineo v. State*, 908 A.2d 632, 638 (Maine 2006).

In this case, contrary to the holdings of all the courts identified above, the Eleventh Circuit refused to consider the merits of Butts's argument that trial counsel's decision to adopt a residual-doubt-only strategy was unreasonable under the circumstances. *Butts*, 850 F.3d at 1208. By refusing to engage in any assessment of whether trial counsel's strategic decision was unreasonable, the Eleventh Circuit created a circuit split between itself and those courts that have expressly concluded that some strategic decisions *are* so unreasonable as to constitute deficient performance.

B. The Decision Below Was Incorrect

By concluding that it "cannot and will not second guess trial counsel's strategic decision to focus on residual doubt instead of mitigation evidence, especially where that decision was made after a thorough investigation into mitigating circumstances," 850 F.3d at 1208, the Court of Appeals effectively held that such a strategic decision is *wholly immune* from review.

This is flatly inconsistent with both *Strickland* and the decisions of sister circuits interpreting *Strickland*. This Court in *Strickland* contemplated

situations in which trial counsel may have conducted a "thorough investigation," and concluded that "strategic choices made after thorough investigation of law and facts relevant to plausible options are *virtually* unchallengeable." 466 U.S. at 690 (emphasis added). But *virtually* unchallengeable and wholly immune from challenge are not the same standard. *See Phoenix* , 233 F.3d at 85 n.2. As the Sixth Circuit explained in *Miller*, despite *Strickland*'s "strong presumption," counsel's "trial strategy itself must be objectively reasonable." 385 F.3d at 673. The Eleventh Circuit's implicit holding that an unreasonable strategy cannot be challenged thus contravenes *Strickland* and conflicts with the decisions of other circuits.

The Eleventh Circuit's error is outcome-determinative for Butts. Trial counsel here failed to introduce any mitigation evidence about Butts's background and character and instead relied on "residual doubt" alone in circumstances that made that choice objectively unreasonable: (1) the jury heard overwhelming evidence of guilt at trial, including Butts's own testimony that he was at the crime scene and participated in the robbery of the victim; (2) the jury heard testimony from two witnesses that Butts confessed to being the triggerman; (3) the jury needed just 65 minutes of deliberations after a lengthy trial to convict Butts of malice murder, felony murder, and four additional counts; and (4) the state took almost an entire trial day, calling 15 witnesses offering aggravating evidence while the defense called no witnesses who knew Butts and could humanize him for the jury. Under these circumstances, and under the

prevailing professional norms at the time of trial, the "strategic" decision not to introduce any mitigation evidence and rely solely on "residual doubt" was objectively unreasonable and constituted deficient performance.

C. The Issue Is of Exceptional Importance

The proper standard for evaluating claims of objectively unreasonable strategic decisions is an important question that this Court should clarify as soon as possible.

The question arises frequently in the lower courts, as defendants often challenge actions or inactions that trial counsel will later assert to have been strategic. *See, e.g.*, *Chapman*, 593 F.3d at 369; *Villalpando*, 259 F.3d at 939; *Bullock*, 297 F.3d at 1048; *Phoenix*, 233 F.3d at 85 n.2; *Thomas*, 428 F.3d at 499–500; *Miller*, 385 F.3d at 673; *Dixon*, 266 F.3d at 703; *Duncan v. Ornoski*, 528 F.3d 1222, 1239 (9th Cir. 2008); *Kolenovic*, 32 N.E.3d at 311; *Thompson*, 20 A.3d at 260; *Pineo*, 908 A.2d at 638. This Court should grant this Petition to resolve the issue and reassert the proper standard for evaluating ineffective-assistance claims based on allegedly strategic decisions.

D. This Case Is an Ideal One for the Court to Resolve the Issue

This case provides this Court with an exceptional opportunity to resolve the issue. The circumstances of Butts's conviction—including the evidence presented and the minimal time needed for jury deliberations—underscore the importance of

considering the reasonableness of so-called strategic decisions on an individualized basis.

Moreover, the record here establishes that trial counsel presented residual doubt evidence to the exclusion of mitigating evidence about the defendant's background in circumstances that made the decision manifestly unreasonable. The issue is thus squarely presented and outcome-determinative.

III. THE STATE COURT'S CONCLUSION THAT PETITIONER WAS NOT PREJUDICED WAS UNREASONABLE

The state habeas court's errors as to *Strickland*'s deficient performance prong were compounded by its errors in determining whether Butts was prejudiced by trial counsel's performance.

A petitioner in a capital case is prejudiced by counsel's failure to effectively investigate mitigation evidence if "there is a reasonable probability that at least one juror would have struck a different balance" at sentencing. *Wiggins*, 539 U.S. at 537. This Court's clearly established precedent provides that "[t]o assess th[e] probability" that at least one juror would have voted against the death penalty, courts must consider "'the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding'—and 'reweig[h] it against the evidence in aggravation.'" *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (quoting *Williams*, 529 U.S. at 397–98).

The state habeas court decision, affirmed by the Court of Appeals, was unreasonable in at least four

respects as to prejudice. First, it unreasonably applied clearly established Supreme Court precedent by failing to consider what effect the *totality* of the new mitigation evidence might have had on the jury. *See id.* The state habeas court's opinion considered separately the prejudice stemming from each alleged deficiency. Pet. App. 298–307, 322–26. The state habeas court thus unreasonably applied clear Supreme Court precedent requiring a holistic approach to judging prejudice. 28 U.S.C. § 2254(d)(1). Given that in Georgia only one juror needed to be swayed to prevent a death sentence from being imposed, it was unreasonable for the state habeas court to find that there was no reasonable probability that the newly offered evidence would have changed the result of the proceeding.

Second, the state habeas court unreasonably applied *Wiggins, Williams*, and *Porter* by failing to reweigh the newly-offered mitigation evidence against the original aggravating evidence. *See* 28 U.S.C. § 2254(d)(1). As *Porter* instructs, the state habeas court was required to engage in a two-step analysis. First, it was to consider "'the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding.'" *Porter*, 558 U.S. at 41 (quoting *Williams*, 529 U.S. at 397-98). The state habeas court did not do that. In fact, in its prejudice analysis, the state habeas court never even acknowledged that trial counsel presented absolutely no mitigation evidence about Butts during the sentencing phase of the trial. The state habeas court completely abdicated its duty to consider the totality

of the mitigation evidence and then "reweigh it against the evidence in aggravation." *Id.* (quotation marks omitted). Indeed, the aggravating evidence was not even mentioned in the state habeas court's analysis, let alone compared to the new mitigating evidence presented by Butts at the state habeas evidentiary hearing.

Third, the state habeas court based its decision on unreasonable fact-finding. *See* 28 U.S.C. § 2254(d)(2). The state habeas court simply ignored or misstated much of the compelling testimony offered by Butts at the state habeas evidentiary hearing. For example, it found as a matter of fact that Westin introduced co-defendant Wilson's prior criminal record during sentencing, when in fact the only criminal history presented at trial was Butts's own record. *Contrast* Pet. App. 276–78 *with* Doc. 10-7 at 79–84. Similarly, the state habeas court never considered the likely impact on the jury of the rampant mental health issues in Butts's family, his mother's absence and erratic behavior due to drug addiction, the violence he witnessed, and the impact that all of these factors had on his development, as summarized by mitigation expert Vogelsang. As in *Rompilla*, "[i]t goes without saying that the undiscovered mitigating evidence [here], taken as a whole, might well have influenced the jury's appraisal of [the defendant's] culpability," 545 U.S. at 393 (internal quotation marks omitted); and the likelihood of a different result if a jury had heard the evidence is "sufficient to undermine confidence in the outcome" actually reached at sentencing, *Strickland*, 466 U.S. at 694. Indeed, a number of the state habeas court's key factual findings were clearly

erroneous, such as finding that "Petitioner's father had no role in Petitioner's life," Pet. App. 300–01, despite record evidence of an incident in which Butts's father held Butts naked and covered with oil under a heat lamp, Doc. 13-4 at 119–20.

Fourth, despite this Court's clearly established precedent that courts may not conduct a "truncated prejudice inquiry," *see Sears v. Upton*, 561 U.S. 945, 955 (2010); *Williams*, 529 U.S. at 397–98, the state habeas court did exactly that. Although the state habeas court said that the new evidence would not have made a difference, it never explained why. The habeas court simply did nothing to analyze how the jury would have weighed the original aggravating evidence against the substantial and specific new mitigation evidence or why there was not a reasonable probability that a single juror would have reached a different result. The state habeas court thus unreasonably applied *Sears* and *Williams*. *See* 28 U.S.C. § 2254(d)(1).

The Court of Appeals' rubber-stamping of the state habeas court's unreasonable application of clearly established Supreme Court precedents and unreasonable determinations of fact merit review in this Court. This is especially true because the Court of Appeals' deficient-performance analysis in this case conflicted with Supreme Court and sister circuit precedent, as set forth above.[5]

[5] By demonstrating ineffective assistance of trial counsel, Butts has established that appellate counsel's deficient performance prejudiced him and that he is therefore entitled to relief.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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