CASE NO. _____ (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

WESLEY RUIZ,
Petitioner,

v.

BOBBY LUMPKIN, DIRECTOR,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

CAPITAL CASE

Under the Due Process clause, and the Eighth Amendment, should the prosecution be held responsible for the presentation of false expert testimony on an issue of importance at a capital sentencing trial that it knew, or should have known, was false, and did the Fifth Circuit err by finding that question was not debatable among reasonable jurists.

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The opinion of the United States Court of Appeals for the Fifth Circuit is unpublished. It appears in the appendix and is reported as *Ruiz v. Davis*, 819 F. App'x 238 (5th Cir. 2020). The opinion denying panel reconsideration is not reported and appears in the appendix.

The opinion of the United States District Court for the Northern District of Texas denying the petition for habeas corpus, *Ruiz v. Davis*, No. 3:12-cv-5112, 2018 WL 6591687 (N.D. Tex. Dec. 14, 2018), is unreported and appears in the appendix.

JURISDICTION

The Court of Appeals denied Mr. Ruiz's request for a certificate of appealability on July 7, 2020 and denied a petition for rehearing on January 22, 2021. This Court has jurisdiction under 28 U.S.C. § 1254.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law[.]

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

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

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

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

STATEMENT

A. Trial Proceedings

Mr. Ruiz was convicted and sentenced to death for the shooting of Dallas police officer Mark Nix. The evidence showed that Officer Nix attempted to stop Mr. Ruiz in his vehicle. After a chase that was joined by other police vehicles, Mr. Ruiz lost control of his car and crashed. Police cars surrounded the vehicle, which blocked any path to escape. Officer Nix exited his vehicle, ran to Mr. Ruiz's car, and struck the car window. Mr. Ruiz fired one shot that struck and killed Officer Nix.

Under Texas law, in order to impose the death penalty, the prosecution must prove that the defendant is likely to be a future danger to society. Tex. Code Crim. Proc. Ann. art. 37.071 (West 2021). In an effort to meet that burden at the penalty phase of Mr. Ruiz's trial, the Dallas County prosecutor retained A.P. Merillat,[1] a criminal investigator for the Huntsville Special Prosecution Unit, which

[1] The transcripts use the spelling Merrillott. The Fifth Circuit spelled his name Merillat. Petitioner uses the Fifth Circuit's spelling.

investigates crimes committed in Texas state prisons. ROA.5025.[2] Merillat testified that under the Texas Department of Criminal Justice (TDCJ) plan that if the jury sentenced Mr. Ruiz to life without parole (LWOP), then he could be reclassified to a less restrictive classification that would provide him with greater freedom. ROA.5026-27. In other words, Mr. Ruiz could have a greater opportunity to be violent. After explaining G-1 classification was the least restrictive and G-5 was the most restrictive, Merillat testified that LWOP inmates would be automatically classified as G-3 and could receive a less restrictive classification after ten years. ROA.5026-27. When defense counsel suggested that a prisoner sentenced to LWOP could never get less than a G-3 classification, Merillat told counsel he was wrong. Merillat explained that after ten years, an LWOP prisoner has the opportunity to downgrade to a less restrictive classification based on his behavior. ROA.5031.

Merrilat's testimony was false. The TDCJ had changed its classification scheme in 2005, which was three years before Mr. Ruiz's trial. Under its new regulations, in effect at the time of Mr. Ruiz's trial, LWOP prisoners were never classified to a custody less restrictive than G-3. *Estrada v. State*, 313 S.W.3d 274, 287 (Tex. Crim. App. 2010) (taking judicial notice of the TDCJ's policy change). *See also Ruiz v. Davis*, 819 F. App'x 238, 240 (5th Cir. 2020). The State never corrected Merillat's false testimony. Nor did the State disclose the current regulations that

[2] ROA refers to the electronic record on appeal filed in the Fifth Circuit.

would have shown the testimony to be false. Defense counsel did not object. And despite defense counsel's retention of an independent Texas prisoner-classification expert who testified at trial, this expert did not identify Merillat's statement as erroneous for the jury.

In urging the jury to find future dangerousness, the prosecutor reminded the jurors of Merillat's testimony during his penalty phase closing argument. He argued to the jury that sentencing Mr. Ruiz to death would guarantee that he would be held in the most restrictive classification. He argued that an LWOP sentence would allow Mr. Ruiz much greater freedom and would be "a recipe for disaster." ROA.5176. He said, the "only way" the jury could "guarantee and protect everybody down there at that prison system for as long as [Ruiz] is alive is to put him there on death row like A.P. Merillat told you." ROA.5176.

During deliberations, the jury sent the judge a question about the classification process. However, the judge did not provide a substantive answer. Instead, he told the jury they would have to ask a more specific question identifying any areas of dispute. ROA.1284-85. After deliberations, the jurors answered "yes" to the future dangerousness special issue No. 1, and "no" to the mitigation special issue No. 2. ROA.5182. The trial judge then sentenced Mr. Ruiz to death.

B. Direct Appeal and Initial State Habeas Proceedings

Mr. Ruiz appealed to the Texas Court of Criminal Appeals (TCCA), which affirmed his conviction and sentence. *Ruiz v. Texas*, No. AP-75,968, 2011 WL

1168414 (Tex. Crim. App. Mar. 2, 2011). This Court denied certiorari. *Ruiz v. Texas*, 565 U.S. 946 (2011).

Mr. Ruiz also filed a timely state habeas petition, quickly followed by a supplement to that petition. Those pleadings did not raise any issues concerning Merillat's testimony. The petition was denied on the merits, and the supplement was dismissed as a subsequent habeas application without an exception to the successive-petition bar. *Ex parte Ruiz*, Nos. WR-78,129-01, WR-78,129-02 (Tex. Crim. App. Sept. 26, 2012) (finding the supplement an "abuse of the writ," citing Tex. Code Crim. Proc. Ann. art. 11.071 § 5(a)) (West 2021). The TCCA adopted the trial court's factual findings and legal conclusions. This Court denied certiorari review. *Ruiz v. Texas*, 569 U.S. 906 (2013).

In 2010, while direct appeal and state habeas proceedings were ongoing, the TCCA issued its decision in *Estrada*, granting relief based on Merillat's false testimony. His false testimony in *Estrada* was identical to his testimony in Mr. Ruiz's case. *Estrada,* 313 S.W.3d at 286-87. Notably, in *Estrada*, the State conceded the unconstitutionality of presenting Merillat's false testimony regarding the 2005 classification change because the "jury's questions" suggested they were influenced by Merillat. *Id.* When challenged on appeal, the State conceded that the admission of the false testimony necessitated a new sentencing hearing.

Reviewing *Estrada's* claim independently, the TCCA agreed. *Id.* at 288. After taking judicial notice of the 2005 changes in the classification system that rendered the testimony false, the court held that "there is a fair probability that

appellant's death sentence was based upon Merillat's incorrect testimony." *Id.* at 287. The TCCA granted relief even though the defendant had not objected to the false testimony at trial. The court held that the defense had no reason to know that the testimony was false (even though the defense had retained its own expert and the classification change had been made years before the trial), because the case involved the State's duty to correct false testimony. *Id.* at 288. The TCCA also granted relief due to Merillat's false testimony in *Velez v. State*, No. AP-76,051, 2012 WL 2130890, at *32 (Tex. Crim. App. June 13, 2012).

In Mr. Ruiz's case, by contrast, the State did not act on its duty to correct false testimony, even after *Estrada* was decided. The State remained silent, while the defense pursued appellate and post-conviction relief, even though the same error that necessitated relief in *Estrada* also occurred here.

C. Federal Habeas Proceedings

Mr. Ruiz filed a habeas petition in federal court, where for the first time he raised claims related to Merillat's testimony. Because those issues had not been raised in state court, Mr. Ruiz filed a motion to stay the federal proceedings so that he could exhaust his Merillat-related claims in state court with another habeas petition. The federal district court granted the stay. The TCCA dismissed Mr. Ruiz's second petition as an abuse of the writ. *Ex parte Ruiz*, No. WR-78,129-03 (Tex. Crim. App. Nov. 19, 2014).

Mr. Ruiz resumed his federal habeas proceedings, urging *inter alia*, that the prosecutor violated his constitutional rights to due process under *Brady v.*

Maryland, 373 U.S. 83, 87 (1963), and *Napue v. Illinois*, 360 U.S. 264, 269 (1959), by presenting false expert testimony and by failing to correct the false parts of that testimony. He also asserted that the jury's reliance on this false evidence in sentencing him to death constituted cruel and unusual punishment under *Johnson v. Mississippi*, 486 U.S. 578 (1988). The district court found the claims defaulted and did not issue a COA. *Ruiz*, 2018 WL 6591687, at *6-7, *14.

Mr. Ruiz filed a timely appeal to the Fifth Circuit Court of Appeals and requested a COA on his Merillat-related claims and other constitutional violations. The Fifth Circuit held that reasonable jurists could not debate the district court's holding that Mr. Ruiz's Merillat-related claims were procedurally defaulted and that the Texas abuse-of-the-writ rule was adequate and independent. *Ruiz*, 819 F. App'x at 243.

The Fifth Circuit acknowledged that Merillat's testimony was "indisputably incorrect," *id.* at 240, but nonetheless concluded that Mr. Ruiz had not made the minimal threshold showing to warrant a COA on his Due Process and Eighth Amendment claims, *id.* at 243. In a footnote, the court indicated its belief that the *Brady* claim lacked merit. The court explained that the prosecutor could not be held responsible for the false testimony because the prosecutor had no duty to correct the error after the *Estrada* decision and because there was no evidence that showed the prosecutor knew the testimony was false at the time of trial. *Id.* at 243 n.4. The *Napue* claim was found meritless for similar reasons. *Id.* at 243 n.5.

REASONS FOR GRANTING THE WRIT

I. This Court Should Determine Whether Due Process and the Eighth Amendment Were Violated When, at Petitioner's Capital Sentencing Trial, the Prosecution Elicited False Testimony From Its Expert Witness That It Failed to Correct, Thus Compromising the Reliability of the Death Sentence.

Is the prosecution responsible when it presents false expert testimony at a capital sentencing hearing and makes no effort to correct it? That question, at issue here, should at least be debatable among reasonable jurists. But the Fifth Circuit held that the prosecution was absolved of its responsibility and that such a question did not even meet the modest bar necessary to grant a COA.

The issue should have been simple. The State presented false expert testimony at a capital sentencing proceeding. The State did not disclose that its evidence was false and made no effort to correct that testimony either at trial or in post-conviction or appellate proceedings. Mr. Ruiz meets the standards set by *Brady v. Maryland,* 373 U.S. 83 (1963); *Napue v. Illinois,* 360 U.S. 264 (1959); *United States v. Agurs*, 427 U.S. 97 (1976); and *Johnson v. Mississippi*, 486 U.S. 578 (1988). The State is responsible for an unreliable death sentence. As *Estrada* reached this same conclusion, the issue is one that is unquestionably debatable.

However, unlike *Estrada* where the State and the courts were willing to overlook the default in order to protect the reliability of a capital sentencing proceeding, in this case, the State has been allowed to maintain a death sentence even though it was based on the false testimony presented by its own expert.

Because the question is important, and because the introduction of false expert testimony at a capital sentencing trial introduces arbitrariness and undermines both the reliability of the jury verdict and the heightened scrutiny required in capital cases, this Court should grant certiorari. At a minimum, this Court should vacate and remand to the Fifth Circuit with instructions to grant a COA.

Even though the Fifth Circuit found this claim defaulted in state court, the merits of the issue remain central, and ripe for review, because the merits demonstrate cause and prejudice to overcome any default. This Court has recognized that a meritorious *Brady* claim overcomes any default. *See Strickler v. Greene*, 527 U.S. 263, 281-82 (1999) (demonstration of cause is shown by establishing *Brady's* suppression prong, and prejudice is shown by establishing materiality); *Banks v. Dretke*, 540 U.S. 668, 690 (2004) (same). Thus, if Petitioner's claim is meritorious, it overcomes default and establishes a constitutional violation.

There is no dispute that the expert testimony presented to the jury by the prosecution's expert on the Texas prison classification system was false. The Court of Appeals found the expert testimony about classification levels "indisputably incorrect." *Ruiz*, 819 F. App'x at 240. The expert's testimony that, after ten years, a prisoner sentenced to LWOP could be classified to a low level of security that would allow the prisoner the opportunity to work outside the prison walls and give him far greater opportunity to commit additional violent acts and even a greater opportunity to escape, was demonstrably not true. At the time of the sentencing

trial, Texas no longer allowed a LWOP prisoner to receive a reduced security level, regardless of a prisoner's positive or negative adjustment to prison.

Yet the prosecutor made no effort to correct the false testimony, as required by *Brady* and *Napue*. Nor did the prosecutor disclose the current regulations that would have shown the expert's error as required by *Brady*. In order to ensure the integrity and reliability of the death sentence, this Court should review whether the prosecution failed to discharge its constitutional obligations.

The prosecution should not be permitted to benefit from its constitutional errors. Yet, in this case, the false expert testimony played an important role at Mr. Ruiz's capital sentencing trial. Under the Texas capital sentencing scheme, future dangerousness is the critical factor a jury must find before it can sentence someone to death. The false expert testimony, emphasized by the prosecutor in closing argument, enhanced the potential for future dangerousness. Certiorari is appropriate to determine the level of prosecutorial responsibility.

The Fifth Circuit was correct that the record does not show when the prosecution learned that its expert testimony was false. Yet no court has ever allowed factual development of this claim, and the prosecutor has never been called to answer about his knowledge or lack thereof. Petitioner's claim should not have been rejected without an evidentiary hearing where the prosecutor's knowledge of the false testimony could have been explored. At this stage of the proceedings, the Fifth Circuit's assumption that the trial prosecutors did not know that its evidence

was false is unjustified and further demonstrates the need for this Court's intervention.

This is particularly true where, as here, Mr. Ruiz showed it was likely that the State actually knew of the 2005 classification at the time of trial because: (1) Merillat, and therefore the State, was in possession of the classification change at trial, and (2) the Dallas County DA's Office furnished the classification change in 2009 in another case prior to the publication of *Estrada* and *Velez*, and prior to Mr. Ruiz's direct appeal or initial state habeas proceedings. ROA.81; *State v. Mark Robertson*, No. F89-85961-L (Aug. 28, 2009). The State failed to take similar action to fulfill their obligations to Mr. Ruiz.

Moreover, regardless of the State's actual knowledge, the State should have known about the classification change at trial. In *Agurs*, 427 U.S. at 103, this Court identified the test as whether the prosecutor "knew or should have known" of the false testimony. A conviction based in part on false evidence, even false evidence presented in good faith, does not comport with fundamental fairness. *Maxwell v. Roe*, 628 F.3d 486, 506 (9th Cir. 2010).

In *Estrada,* Texas prosecutors and the TCCA rightly recognized that the State bears responsibility for correcting testimony identical to that presented here, because it is false and misleading and undermines the reliability of a jury's death verdict. It is arbitrary and irrational to treat Mr. Ruiz differently. Here, before presenting expert testimony about the classification system, the prosecution surely should have known that the regulations were amended several years earlier and

ensured that its expert was relying on the controlling regulations at the time of trial. *See Smith v. Massey*, 235 F.3d 1259, 1271 & n.6 (10th Cir. 2000) (assuming that the presentation of false expert testimony violates *Napue* where the expert acted recklessly and should have known that the testimony was not accurate), *abrogated on other grounds by Neill v. Gibson*, 278 F.3d 1044 (10th Cir. 2001).

Indeed, the Fifth Circuit's opinion in this case is inconsistent with its own prior case law. In *United States v. Auten*, 632 F.2d 478 (5th Cir. 1980), the State failed to disclose that a key witness had been convicted more than one time, contrary to his trial testimony. The Government denied having knowledge because it had not made inquiries with the FBI or the National Crime Information Center. *Id.* at 480. That the prosecutor "chose not to run an FBI or NCIC check on the witness, does not change 'known' information into 'unknown' information within the context of the disclosure requirements." *Id.* at 481. Because "the prosecutor has ready access to a veritable storehouse of relevant facts and, within the ambit of constitutional, statutory and jurisprudential directives, this access must be shared 'in the interests of inherent fairness . . . to promote the fair administration of justice.'" *Id.* (quoting *Calley v. Callaway*, 519 F.2d 184, 223-24 (5th Cir. 1975)). "If disclosure were excused in instances where the prosecution has not sought out information readily available to it, we would be inviting and placing a premium on conduct unworthy of representatives of the United States Government. This we decline to do." *Auten*, 632 F.2d at 481. *See also United States v. Deutsch*, 475 F.2d 55, 57 (5th Cir. 1973) (government cannot rely on Post Office witness but deny

having access to Post Office files, because different government entities were closely connected for purposes of the case and should not be considered "severable entities" for purposes of establishing knowledge of exculpatory evidence).

The true information about the classification system was undoubtedly known by the administrators of the TDCJ who run the state prison system. Moreover, the prosecutor's expert was also a law enforcement investigator who was employed by the state. As state employees and law enforcement personnel, their information should be imputed to the trial prosecutors. *See, e.g., McCormick v. Parker*, 821 F.3d 1240, 1247-48 (10th Cir. 2016) (medical experts involved in the investigation are considered part of the prosecution team); *United States v. Buchanan*, 891 F.2d 1436, 1442-43 (10th Cir. 1989) (ATF agent who testified at defendant's trial as a firearms expert had their knowledge imputed to the government).

Here, however, the Fifth Circuit has excused the State's presentation of false testimony about the State's own prison classification system. This is the exact opposite approach that Texas courts took in *Estrada*. This Court should resolve these inconsistent holdings and consider the important and recurring question of whether the government should be held responsible when it presents testimony from a state-employed expert and that expert testifies falsely. The Fifth Circuit also opined that the defendant was responsible for not correcting the false information because the classification regulations were publicly available. Whether a prosecutor can avoid his duty to disclose and shift responsibility to the defendant raises questions upon which the Courts of Appeals are split. *Compare Dennis v.*

Sec'y, Penn. Dep't Corrs., 834 F.3d 263, 290-92 (3d Cir. 2016) (reviewing this Court's case law and determining that the prosecutor's duty to disclose is not dependent on defense counsel's actions; *Brady* and its progeny are focused on prosecutorial disclosure, not defense diligence) *and Benson v. Chappell*, 958 F.3d 801, 837 n.28 (9th Cir. 2020) (favorable information contained in public records is not exempt from *Brady* disclosure requirements) *with Bell v. Bell*, 512 F.3d 223, 235-36 (6th Cir. 2008) (no *Brady* violation where the defense was aware of the facts necessary to obtain the information) *and United States v. Roy,* 781 F.3d 416, 421 (8th Cir. 2015) (no *Brady* violation where defendant has access to the information through other means).

This Court should use this case to resolve that split. But, at the very least, the difference in treatment by the appellate courts demonstrates that this is an issue upon which reasonable jurists disagree, and thus certiorari should be granted so that the issue can be fully briefed and reviewed.

In sum, the Fifth Circuit's superficial reasoning amounts to little more than excuses for why the prosecution should not be held responsible for its introduction of false expert evidence into the capital sentencing process. But the stakes here are high, and this Court's review is appropriate. After all, this Court has repeatedly held that, because of its finality, death sentences should be held to a level of heightened scrutiny. *E.g.*, *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978). This Court gives "a greater degree of scrutiny" to capital sentencing decisions. *California v. Ramos*, 463 U.S. 992, 999 (1983).

The differences in treatment between this case and *Estrada* exemplifies the arbitrariness of the process, as it allows two defendants whose sentences were affected by the same false information from the same expert witness, to be treated differently. Estrada was given a chance to live, but Mr. Ruiz was condemned to die. In the modern age of capital punishment, this Court has sought to avoid such an arbitrary application of the death penalty. *See Gregg v. Georgia*, 428 U.S. 153, 188 (1976). The arbitrariness in this case epitomizes the need for this Court's review.

Most importantly, the constitutional rules underlying our system of capital punishment seek to ensure the reliability of the jury's determination. *Roper v. Simmons,* 543 U.S. 551, 569 (2005) (death penalty can only be applied to those who can be classified "with reliability" as the worst offenders). The Constitution requires a greater degree of reliability when the death penalty is imposed. *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985). Yet a reliable decision depends on the information before the jury being truthful and accurate. *Johnson*, 486 U.S. at 590 (Eighth Amendment is violated when a death sentence is based on materially inaccurate evidence). True and complete information can yield reliable results. But false, inaccurate, and incomplete information undermines the reliability of the process. *United States v. Tucker*, 404 U.S. 443, 447 (1972) (non-capital sentence based, at least in part, on significant misinformation requires resentencing). This Court should grant review to place responsibility where it belongs – on the prosecution that supplied the false expert evidence to the jury deciding Mr. Ruiz's fate.

II. Was Petitioner Entitled to a Certificate of Appealability Because His Claims Had At Least Some Merit Where the Court of Appeals Found that the State Introduced Expert Testimony at Petitioner's Capital Sentencing Trial That Was "Indisputably Incorrect."

The Fifth Circuit's decision denying COA is inconsistent with the standards this Court has set forth for granting COA – a standard the Court below cited but did not apply. This Court should enforce those standards here.

Under 28 U.S.C. § 2253(c)(2), a court should grant leave to appeal where a habeas petitioner makes a "substantial showing of the denial of a federal constitutional right." As the Court reiterated in *Buck v. Davis*, 137 S. Ct. 759 (2017), the COA inquiry is not coextensive with the merits of the claim. "At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Id.* at 773 (quoting *Miller–El v. Cockrell*, 537 U.S. 322, 327 (2003)).

A petitioner meets the substantial showing standard when he presents a claim that "is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Martinez v. Ryan*, 566 U.S. 1, 14 (2012). A claim is only insubstantial if "it does not have any merit or . . . it is wholly without factual support." *Id.* at 16.

Given the "indisputably incorrect" nature of Merillat's testimony, and its influence on the jury's sentencing determination, the issues raised on appeal at least "deserve encouragement to proceed further." *Buck*, 137 S. Ct. at 773. In

addition, Mr. Ruiz has pointed to: (1) the grant of relief on identical issues in *Estrada* and *Velez*; (2) the State's closing argument urging the jury to follow Merillat's false testimony; (3) the jury's questions about the TDCJ classification procedures; and (4) the fact that future danger is always at issue for the jury, *see Simmons v. South Carolina*, 512 U.S. 154, 162 (1994). In light of all of these factors, and given all of the arguments detailed above, Mr. Ruiz has shown that his issues have at least "some merit" and have factual support in the record. The Fifth Circuit's denial of COA was in clear violation of § 2253(c)(2) and was an abdication of the Court's appellate duty.

The Fifth Circuit has presented this Court with persistent problems in its application of the COA standard. This Court has reversed that court's decision to deny a COA on at least three prior occasions. *See Buck* 137 S. Ct. at 180; *Tennard v. Dretke*, 542 U.S. 274, 289 (2004); *Miller–El*, 537 U.S. at 327. In *Buck*, this Court had to remind the Fifth Circuit once again that that the COA determination is a "threshold" inquiry and "is not coextensive with a merits analysis." 137 S. Ct. at 773. This Court has not needed to subject any other Court of Appeals to this level of review of its COA practice.

This case demonstrates that while the Fifth Circuit may have adopted the form required by *Buck*, it continues to ignore its substance. Thus, while it purports to apply the *Buck* standard, its actual holding ignores the threshold standard. Mr. Ruiz's claim easily meets the threshold standard. If the State's action in presenting Merillat's "indisputably incorrect" testimony at a capital trial to secure a death

sentence does not make "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), then the COA standard has no meaning. The State's Eighth Amendment and Due Process violations in this context will never garner federal habeas review. Regardless of the ultimate disposition of his claim, Mr. Ruiz should at least be entitled to full appellate review.

CONCLUSION

For these reasons, this Court should grant this petition for a writ of certiorari and place this case on its merits docket. In the alternative, this Court should grant certiorari, vacate the decision below, and remand this case to the Fifth Circuit with instructions to grant a Certificate of Appealability.

Respectfully submitted,

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