No. 17-9535

In the Supreme Court of the United States

JOHN WILLIAM KING,
Petitioner,
v.
LORIE DAVIS , 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

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REPLY BRIEF OF PETITIONER

CAPITAL CASE

A. Richard Ellis
Texas Bar No. 060560400
75 Magee Avenue
Mill Valley, CA 94941
TEL: (415) 389-6771
FAX: (415) 389-0251
a.r.ellis@att.net

Member, Supreme Court Bar
Counsel of Record for Petitioner

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Respondent's Brief In Opposition ("BIO") is based on assertions regarding the record, Mr. King's arguments, and the law that do not withstand scrutiny. Respondent argues that in this matter "the Fifth Circuit followed this Court's directive that the COA [certificate of appealability] inquiry 'is not coextensive with a merits analysis' and 'should be decided without 'full consideration of the factual and legal bases adduced in support of the claims.'" BIO at i, quoting *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) and *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). This argument is unavailing as shown in King's petition and herein.

I. Introduction.

This petition is important, not just in the context of Mr. King's case, but to correct an ongoing misapplication of this Court's guidelines for a COA. Intervention is needed, once again, to correct the Fifth Circuit Court of Appeals' unique and idiosyncratic method of determining when a state prisoner may appeal the denial or dismissal of his petition for writ of habeas corpus. *Miller-El*, 537 U.S. at 336-338; *Buck v. Davis*, 137 S. Ct. at 773. Once again, unduly restrictive COA standards have been used by the Fifth Circuit. In contravention to the holdings of *Miller-El* and *Buck*, the Fifth Circuit pre-judged the merits and required too high a threshold for assessing whether reasonable judges might disagree.

King presents three claims upon which the district court (Appendix C: *King v. Director, TDCJ*, 2016 WL 3467097 (E.D. Tex., June 23, 2016)) and then the Fifth Circuit (Appendix B, *King v. Davis*, 703 F. App'x 320, 334-335 (5th Cir. 2017)) denied a COA. These issues are:

> 1) Whether defense counsel were ineffective in the penalty phase regarding the "future dangerousness" special issue;
> 2) whether defense counsel were ineffective in moving for a change of venue;
> 3) whether counsel were ineffective for failing to obtain and/or use a defense expert to present psychiatric evidence at the guilt and punishment phases of the trial.

Respondent hyperbolically asserts that "King's argument appears to be that any discussion of the merits by the Fifth Circuit necessarily violates *Miller-El* and *Buck*" and that "all discussion of the merits is taboo." (BIO at 24). This is not King's argument as he has shown that the Fifth Circuit's holdings on these claims were not merely a "threshold determination of whether the claims have 'some merit,'" (BIO at 24, citing *Martinez*, 566 U.S. at 14) or a mere "overview of the claims," (BIO at 25, citing *Miller-El,* 537 U.S. at 336) as Respondent attempts to characterize them. The holdings of the Fifth Circuit are contrary to *Miller/El* and *Buck* in that they do not limit the COA question to this threshold inquiry, decide the claims on the basis of a

premature merits analysis, and/or do not recognize that the question is debatable. Additionally, King's extensive showing that the Fifth Circuit engaged in a full-fledged merits analysis of these claims is barely addressed, let alone controverted.

II. None of These Claims are Procedurally Barred.

Respondent's procedural default arguments as to all three claims (BIO at 26-28 (Claim I); at 33 (Claim II); at 37-40 (Claim III) citing USCA5.11679-11680)) are based on a misinterpretation of this Court's holdings in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) and *Trevino v. Thaler*, 569 U.S. 413 (2013), which held that an ineffective assistance of trial counsel ("IATC") claim that would otherwise be barred can be raised if the petitioner can show that (1) his state habeas attorney was "ineffective under the standards of *Strickland* [*v. Washington,* 466 U.S. 668 (1984)]" and (2) the underlying IATC claims are "substantial one[s], which is to say that the prisoner must demonstrate that the claim has some merit." *Martinez,* 132 S. Ct. at 1318.

As to all three claims, the Fifth Circuit held that King met *Martinez/Trevino*'s first prong, of ineffective assistance of state habeas counsel, but failed to show that these three claims were "substantial." *King*, 703 F. App'x at 328-329.[1] King's petition (at 28-30 (Claim I), 32-35 (Claim II), 38-40 (Claim III)) shows how, in denying a COA as to these claims, the Fifth Circuit's holding that the claims were not "substantial" continued to ignore this Court's explicit holdings in *Miller-El* and *Buck*, and "justif[ied the] denial of a COA based on [the] adjudication

[1] "Heath[initial state habeas counsel]'s belief that King's habeas petition could rely solely on the record was incorrect...The State does not directly counter King's contention that Heath was ineffective. Instead, the state argues that even if Heath was ineffective, King has failed to show that each of his ineffective assistance of counsel claims is substantial (*i.e.*, the second prong of the *Martinez/Trevino* exception). Thus, under these circumstances, we conclude that jurists of reason could debate whether Heath was ineffective in failing to raise any substantial ineffective assistance claims." *King*, 703 F. App'x. at 328.

of the actual merits ... [which] is in essence deciding an appeal without jurisdiction." *Buck,* 137 S. Ct. at 773, quoting *Miller–El*, 537 U.S. at 336–337.

Respondent contends that the three IATC claims are procedurally barred because they were dismissed by the Texas Court of Criminal Appeals ("TCCA") in King's state successor petition as abusive, (BIO at 27-28, 33, 37-40), but the *Martinez/Trevino* exception applies in federal court, not to the state court TCCA holding. Respondent does not seem to dispute the first *Martinez/Trevino* prong, state habeas counsel's ineffectiveness, as indeed she could not,[2] but argues that King has not met the second *Martinez* "substantiality" test. (BIO at 27-28, 33, 37-40). To do that, Respondent argues that King cannot show prejudice under the *Strickland* standard. (BIO at 29-32, 33, 37-40). Yet all claims clearly meet that test, as shown in King's petition (at 24-30, 32-35, 38-40) and herein, as to each claim.

III. Respondent's Arguments Regarding King's Claim Of Ineffective Assistance Of Counsel For Failure To Adequately Present The Future Dangerousness Issue.

King's first claim had two aspects: at the penalty phase, trial counsel failed to effectively counter State's witness Dr. Edward Gripon; and secondly, the defense was ineffective for presenting a harmful witness, Dr. Quijano, who agreed with the State's witness Gripon that King would be dangerous in the future.

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[2] Mr. Heath was totally unaware of the basic purpose of a habeas application and told King that "[t]here are several things you still fail to understand with regards to the appeals process of your case...*both the direct appeal and the Writ are based solely on the record of the case. No new evidence can be brought up at this stage...*The purpose of the writ is not to put forth any new defense." Letter of John Heath to John W. King, dated June 19, 2000. [USCA5.3410] (emphasis added). Heath followed through with this misunderstanding in his application [USCA5.748-774], which was devoid of any extra-record claims, evidenced no investigation, included no exhibits, and worse, indicated that Mr. Heath may not have even read the record, *See, e.g.*, USCA5.749, the statement of facts. ("USCA5" refers to the Fifth Circuit Record on Appeal, followed by the page number).

As to Dr. Gripon, King has shown that the Fifth Circuit's finding of no prejudice based on a three-minute defense cross-examination was a gross mis-chacterization. (*See* BIO at 30-31, adopting the same approach). This cross-examination [USCA5.9399-9402] amounted to a statement by defense attorney Cribbs that "we've done this drill before" [USCA5.9400] followed by general questions that did not specifically address Dr. Gripon's testimony. Yet the Fifth Circuit held that

> in cross-examination, King's trial counsel sought to undermine the predictive capabilities of Dr. Gripon by, for example, getting Dr. Gripon to admit that the American Psychiatric Society's position is that a psychiatrist is no better at predicting future dangerousness than any other individual of equal intelligence. King's trial counsel spent the remainder of his cross-examination drawing out testimony about how Dr. Gripon received information about King only from the prosecution (or the federal government) and how Dr. Gripon did not personally interview King (which Dr. Gripon admitted was the best way to form a prediction on future dangerousness.)
> *King,* 703 F. App'x at 329-330.

Respondent repeats this holding (BIO at 30) which is contradicted by the record [USCA5.9399-9402], as the approximately three minute cross-examination was notably ineffective.[3]

Dr. Quijano was a defense expert who testified to the question of future dangerousness by saying that King *would* in the future commit acts of violence that would constitute a danger to

[3] Defense counsel is credited for pointing out Gripon's "failure to conduct a face-to-face interview with King." (BIO at 30) but this issue was confronted during the State's direct examination of Gripon, not on cross-examination by defense counsel [USCA5.9395-9396]. Defense counsel is also credited with cross-examining Gripon on his "inability to predict future violence with 100 per cent accuracy" (BIO at 30), but this was meaningless because nothing can be predicted with certainty, and this was actually a missed opportunity to show that predictions of future dangerousness are far more often incorrect than correct. *See, e.g., Flores v. Johnson,* 210 F.3d 456, 463-464 (5th Cir. 2000) (Garza, J., concurring). Respondent also credits defense counsel for eliciting from Gripon "that he as a psychiatrist is no better suited than anyone else to predict future behavior" (BIO at 30) but here too, instead of pointing out the high error rates and inaccuracy of these predictions, all the jury was left with was Gripon's statement that they cannot be predicted with certainty.

society [USCA5.9452], the crucial special issue which the jury had to answer in the affirmative in order for King to get the death sentence. Quijano also testified that even in prison, King would be "a risk to others." [USCA5.9466]. As for the second special issue, after searching for mitigation, Quijano found only one factor: that when King was sent to prison, he was assaulted the first day, and was traumatized. [USCA5.9453].

Respondent frames the claim as simply "King rel[ying] on clinical psychologist Mark Cunningham to second-guess the methodologies of Drs. Gripon and Quijano." (BIO at 29). Yet there are many prejudicial aspects to this claim that do not depend on Dr. Cunningham, such as Quijano's testimony that King would re-offend based on his past arrests[USCA5.9455]; his higher risk as a male with no stable job, and a negative peer environment [USCA5.9458-9460]; his alleged lack of remorse [USCA5.9461-9462] and alleged lack of a conscience [USCA5.9463]; and his opinion that the only way the jury had to ensure King is not a future danger is for him to be executed. [USCA5.9466].

Here it is instructive to compare Dr. Quijano's testimony in King's case to his testimony in *Buck*, where the same Dr. Quijano was also a defense expert and his testimony the reason for this Court's finding of prejudice and reversal in that case. In *Buck,* as here an IATC case, "counsel's performance fell outside the bounds of competent representation" for calling him as a defense witness. *Buck*, 137 S. Ct. at 775. Here too, no competent attorney would call a defense witness who would testify as Quijano did and his testimony was more damaging than in *Buck*. Counsel must have or should have known that Quijano was going to testify that King was a future danger, just as in *Buck* "[c]ounsel knew that Dr. Quijano's report reflected the view that Buck's race disproportionately predisposed him to violent conduct; he also knew that the principal point of dispute during the trial's penalty phase was whether Buck was likely to act

violently in the future." *Id.* In *Buck*, defense counsel "specifically elicited testimony about the connection between Buck's race and the likelihood of future violence," *Id.,* whereas here, counsel did worse and, through negligence, *elicited on direct examination* an opinion that King would be violent in the future, without any such "connection." [USCA5.9452]. In *Buck,* "[g]iven that the jury had to make a finding of future dangerousness before it could impose a death sentence, Dr. Quijano's report said, in effect, that the color of Buck's skin made him more deserving of execution." *Id*. Here, Quijano said directly and unequivocally that King would be a future danger, in or out of prison. [USCA5.9452, 9466]. In *Buck* regarding race, and here, regarding the direct issue of future dangerousness,

> the question before the District Court was whether Buck had demonstrated a reasonable probability that, without Dr. Quijano's testimony on race, at least one juror would have harbored a reasonable doubt about whether Buck was likely to be violent in the future. The District Court concluded that Buck had not made such a showing. We disagree.
> *Buck*, 137 S. Ct. at 776.

The Fifth Circuit and Respondent stress the "horrific nature" of the crime (BIO at 32), and in *Buck* "the State primarily emphasizes the brutality of Buck's crime and his lack of remorse. A jury may conclude that a crime's vicious nature calls for a sentence of death." *Id.* But this Court in *Buck* found that the prejudice of Quijano's testimony outweighed the nature of the crime:

> Dr. Quijano testified on the key point at issue in Buck's sentencing. True, the jury was asked to decide two issues—whether Buck was likely to be a future danger, and, if so, whether mitigating circumstances nevertheless justified a sentence of life imprisonment. But the focus of the proceeding was on the first question. Much of the penalty phase testimony was directed to future dangerousness, as were the summations for both sides.
> *Id.*

As here, "[d]eciding the key issue of Buck's dangerousness involved an unusual inquiry. The jurors were not asked to determine a historical fact concerning Buck's conduct, but to render a predictive judgment inevitably entailing a degree of speculation. Buck, all agreed, had committed acts of terrible violence. Would he do so again?" *Id.* As here, "[r]easonable jurors might well have valued his opinion concerning the central question before them." This Court rejected the notion that the error was *de minimis*. *Buck* at 777. And as in *Buck*, Quijano's testimony was misleading, unscientific and, because he basically agreed with prosecution expert Dr. Gripon, prejudicial.[4] The Fifth Circuit's description of a full-fledged debacle as merely arguing for a "different strategy," as does Respondent (BIO at 29), is contrary to the record. This claim, at the very least, is debatable among jurists of reason and was worthy of a COA.

Respondent fails to contest King's showing that Fifth Circuit prematurely reached the merits of this claim, instead discussing the merits of the claim itself. (BIO at 28-32). The Fifth

[4] As Dr. Cunningham stated, a competent expert in 1999 could have: 1) effectively discredited Gripon's faulty risk assessment and shown the low risk of death row and former death row inmates [USCA5.856-864]; 2) shown how the context of a prison setting and prison classification systems would vastly decrease the likelihood of violence; and shown how "almost all of his [Gripon's] factors are irrelevant" [USCA5. 865-868], instead of agreeing with them as Quijano did; 3) shown numerous erroneous and illusory correlations, for instance that past community violence, race, substance abuse, unemployment, breath of victim pool, remorse or post-offense activity, all cited in Gripon's testimony as heightening the risk, and reenforced by Quijano, are in actuality not accurate predictors of future violence [USCA5.868-870]; 4) eliminated the prejudice from Gripon's and Quijano's failure to present the actual low incidence of inmate-on-inmate violence [USCA5.871-872, 878]; 5) shown the fallacy of Gripon's reliance on King's tattoos, correspondence, and the capital offense itself as accurate predictors of future violence [USCA5.872-873]; 6) informed the jury in "specific and empirically based terms" of the "effect of aging-out as decreasing the risk" [USCA5.873]; 7) pointed out that Gripon's (and Quijano's) focus on the single horrific act and that behavior in the context of the community is not predictive of behavior in prison. [USCA5.875]; and 8) shown that Gripon's (and Quijano's) assessments were based on woefully inadequate data. [USCA5.878-879]. Dr. Quijano also prejudiced the other special issue regarding mitigation, as he found only one such factor, King's prison assault and traumatization. [USCA5.9453]. Numerous witnesses, including King's natural father, and family members such as Carol Spedaccini and Samantha Bacon could have provided a history of King's troubled childhood leading to his adoption.

Circuit held that, as to all three IATC claims, that King had to show that his claims met the second *Martinez/Trevino* prong of "whether those claims are substantial." *King*, 703 F. App'x at 328. This was a premature merits determination and King's actual burden was only to show that the claim was *debatable*, as this Court held in *Buck*:

> But the question for the Fifth Circuit was not whether Buck had "shown extraordinary circumstances" or "shown why [Texas's broken promise] would justify relief from the judgment"...Those are ultimate merits determinations the panel should not have reached. We reiterate what we have said before: A "court of appeals should limit its examination [at the COA stage] to a threshold inquiry into the underlying merit of [the] claims," and ask "only if the District Court's decision was debatable." *Miller–El,* 537 U.S., at 327, 348, 123 S.Ct. 1029.
> *Buck,* at 774.

Additionally, the Fifth Circuit reached the merits instead of a debatability standard in holding that "a review of the record revealed that his trial counsel's performance was not deficient in cross-examining Dr. Gripon," that "King's trial counsel sought to undermine the predictive capabilities of Dr. Gripon" *(King* at 329); and, most explicitly, in holding that the claim "lacked merit" while repeating many of the district court's factual errors, such as the extensiveness of the cross-examination (*Id.*). None of these fact-based conclusions could have been made without what exactly *Miller-El* and *Buck* prohibit: "first deciding the merits of an appeal" before determining whether a COA should issue." *Buck* at 773, quoting *Miller–El*, 537 U.S. at 336–337.

IV. Respondent's Arguments Regarding King's Claim Of Ineffective Assistance Of Counsel In Arguing For A Change Of Venue.

The second claim upon which King sought a COA was his claim that trial counsel were ineffective in arguing for a change of venue. Here too, the Fifth Circuit denied the claim using a merits-based analysis that only purported to limit the inquiry to the claim's debatability.

As to the merits, Respondent's argument (BIO at 33-35) errs in addressing King's issue that the central defense flaw at the change of venue hearing was an entirely misguided and doomed fixation on a trivial rise in Jasper property taxes as their main rationale for a change of venue, which only affected each taxpayer to the extent of about five dollars. [ROA.6696]. Contrary to Respondent's argument (BIO at 34-35 n. 13) and the Fifth Circuit's holding that defense counsel's fixation on the tax increase was inconsequential because "the tax theory made only brief appearances in his trial counsel's questioning, *King*, 703 F. App'x at 331, this theory was mentioned throughout the hearing. [USCA5.6695, 6696, 6728, 6751, 6752, 6753], particularly in questioning the State's witnesses. There was also extensive evidence from the jury *voir dire*, ignored by the district court, showing that the atmosphere in Jasper was highly prejudicial. [*e.g.,* USCA5.5.7127, 7172, 7198, 7282, 7362, 7410, 7782].

Additionally, as to prejudice, Respondent argues (BIO at 35) that because co-defendant Brewer also received a death sentence, there was no prejudice. This is not a proper yardstick for prejudice, as factors unique to each case obviously contributed to the respective sentences.

Here again, Respondent fails to discuss the central issue, King's showing that the Fifth Circuit violated *Miller-El* and *Buck* by engaging in a full-fledged merits review to deny a COA:

(1) The Fifth Circuit held that, as to all three IATC claims, that King had to show that his claims met the second *Martinez/Trevino* prong of "whether those claims are substantial." *King*, 703 F. App'x at 328. As discussed *supra,* this was a merits determination and King's actual burden at this stage was only to show that the claim was debatable.

(2) The Fifth Circuit rejected the district court's mis-characterization of this as a "claim based on counsel's failure to call a witness" [USCA5.5840-5841], as it did with the prior claim [USCA5.5835]. Thus, the district court's holdings were at least "debatable."

(3) The Fifth Circuit made explicit (and erroneous) fact-findings on the merits of the claim in holding that the tax increase theory was barely mentioned at the venue hearing; in ignoring the evident anti-King bias in Jasper; in holding that King had failed to show prejudice; and in holding that the denial of the motion was justified despite the massive publicity.

(4) Regarding prejudice, the Fifth Circuit held, as did the district court, that because Brewer, who received a change of venue and received a death sentence and Berry, whose trial was not moved, received a life sentence, "the district court found that this claim was procedurally defaulted because the claim lacked any merit and, thus was not substantial under second prong of the *Martinez/Trevino* exception." *King*, 703 F. App'x at 331. Here again, the Fifth Circuit explicitly did a merits review to hold that the "substantial" threshold of *Martinez/Trevino* was not met.

The Fifth Circuit could not have reached these conclusions without doing exactly what *Miller-El* and *Buck* forbid. "[T]he COA inquiry," the Supreme Court has "emphasized, is not coextensive with a merits analysis." *Buck* at 773. The Fifth Circuit "sidestep[ed]" that inquiry "by first deciding the merits of an appeal" before determining whether a COA should issue. "[J]ustifying [the] denial of a COA based on [the] adjudication of the actual merits ... is in essence deciding an appeal without jurisdiction." *Id*. (*quoting Miller–El*, 537 U.S. at 336–37). When determining whether a COA should issue, the court of appeals therefore must " 'limit [their] examination ... to a threshold inquiry into the underlying merit of [the] claims,' " under which we "ask 'only if the' " district court's " 'decision was debatable.' " *Id*. at 774 (*quoting Miller–El*, 537 U.S. at 327). A "claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that [the] petitioner will not prevail." *Id.* (*quoting Miller–El*, 537 U.S. at 338).

V. Respondent's Arguments Regarding King's Claim That Trial Counsel Were Ineffective In Failing To Present Psychiatric Evidence At Both The Guilt And Punishment Phases Of His Trial.

King also sought a COA on his claim that trial counsel were ineffective in failing to present any psychiatric evidence at both the guilt and punishment phases of his trial. Respondent argues that the guilt-phase portion of the claim was dismissed on summary judgment by the district court (BIO at 37, Director's Appendix A) and the punishment-phase portion of the claim was dismissed by the TCCA as an abuse of the writ in the successor petition. (*Id.*) Yet the Fifth Circuit clearly dismissed the guilt-phase portion on the inapplicable 2254(d) standard:

> The district court reasoned that King's claim lacked merit because there was no evidence that King had any mental disorders that would have supported an insanity defense or that he was incompetent to stand trial, which was highlighted by the fact that Dr. Quijano testified that King would pose less of a future danger because he did not have any mental disorders that could cause irrational reactions. Accordingly, given that the state habeas court considered and rejected this argument, the district court rejected this claim because "King has not shown, as required by 28 U.S.C. § 2254(d), that the State court findings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings...the district court correctly reasoned that, given that the state habeas court did address the merits of this aspect of the claim, King could succeed only if he met the heightened standards of review under § 2254(d).
> *King*, 703 F. App'x at 333.

For the punishment phase of this claim, the Fifth Circuit once again used the merits-based "substantial" test:

> For the punishment phase aspect of this claim, King again focuses on his history of depression, bipolar disorder, and suicide attempts, which he argues was easily discoverable and should have been presented to the jury. Jurists of reason, however, could not debate the district court's conclusion that King's trial counsel's performance was not deficient. In his affidavit in the first state habeas proceedings, King's trial counsel explained that King had denied having any mental disability that could support mitigation and that two psychologists had examined King and found no mental illnesses...Indeed, Dr. Quijano examined

> King, found no evidence of mental illness, and testified that King would pose less of a future danger because he did not have any mental illnesses that could cause irrational reactions. Accordingly, jurists of reason could not debate whether King's trial counsel's performance fell outside of the wide range of reasonable professional assistance. Thus, we deny a COA on this claim because King has failed to meet the second prong of the *Martinez/Trevino* exception.
> *King*, 703 F. App'x at 334.

Here again, the Fifth Circuit engaged in exactly the kind of horse-before-the-cart merits analysis this Court has admonished against in *Miller-El* and *Buck*. The Fifth Circuit held that, as to all three IATC claims, King had to show that his claims met the second *Martinez/Trevino* prong of "whether those claims are substantial." *King*, 703 F. App'x at 328. This was necessarily a merits determination and King's actual burden was only to show that the claim was debatable at this pre-COA stage.

This approach was directly condemned in *Buck* and *Miller-El*. The determination that the claims were not "substantial" was a determination that they were not meritorious. The question that should have been asked first is whether the claims were debatable. "A 'court of appeals should limit its examination [at the COA stage] to a threshold inquiry into the merit of [the] claims,' and ask only if the District Court's decision was debatable.'" *Buck* at 774, quoting *Miller-El*, 537 U.S. at 327, 348. This is because

> Of course when a court of appeals properly applies the COA standard and determines that a prisoner's claim is not even debatable, that necessarily means the prisoner has failed to show that his claim is meritorious. But the converse is not true. That a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable. Thus, when a reviewing court (like the Fifth Circuit here) inverts the statutory order of operations and "first decid[es] the merits of an appeal, ... then justif[ies] its denial of a COA based on its adjudication of the actual merits," it has placed too heavy a burden on the prisoner *at the COA stage*. *Miller–El,* 537 U.S., at 336–337, 123 S.Ct. 1029. *Miller–El* flatly prohibits such a departure from the procedure prescribed by § 2253. *Ibid.*
> *Buck* at 774 (emphasis in original).

Regarding King's history of mental ailments, the Fifth Circuit used the improper 2254(d) standard while giving lip-service recognition to the "debatable" standard:

> King, however, only speculates about what might have been discovered had his trial counsel attempted to have him evaluated by a psychiatrist. King points to his alleged history of depression, bipolar disorder, and suicide attempts, but he does not explain further how this history could have justified (or led to) an insanity defense or an opinion that he was incompetent to stand trial. King's trial counsel's affidavit explained that he had consulted two psychologists, and neither psychologist found evidence that King had any mental illnesses. Accordingly, jurists of reason could not debate the district court's denial of this aspect of the claim under § 2254(d), and thus, we deny a COA on this claim with respect to the guilt phase of trial.
> *King*, 703 F. App'x at 333-334.

The same approach was explicitly condemned in *Buck*: "[t]he court below phrased its determination in proper terms—that jurists of reason would not debate that Buck should be denied relief...but it reached that conclusion only after essentially deciding the case on the merits." *Buck* at 773.

For the punishment phase of this claim, the Fifth Circuit once again used the merits-based "substantial" test:

> For the punishment phase aspect of this claim, King again focuses on his history of depression, bipolar disorder, and suicide attempts, which he argues was easily discoverable and should have been presented to the jury. Jurists of reason, however, could not debate the district court's conclusion that King's trial counsel's performance was not deficient. In his affidavit in the first state habeas proceedings, King's trial counsel explained that King had denied having any mental disability that could support mitigation and that two psychologists had examined King and found no mental illnesses...Indeed, Dr. Quijano examined King, found no evidence of mental illness, and testified that King would pose less of a future danger because he did not have any mental illnesses that could cause irrational reactions. Accordingly, jurists of reason could not debate whether King's trial counsel's performance fell outside of the wide range of reasonable professional assistance. Thus, we deny a COA on this claim because King has failed to meet the second prong of the *Martinez/Trevino* exception.
> *King*, 703 F. App'x at 334.

This is nothing more than "lipservice," *Tennard v. Dretke*, 542 U.S. 274, 283 (2004), to this Court's COA standards, which has been repeatedly disapproved by this Court.

VI. Conclusion.

Mr. King's case is one where the Fifth Circuit has, once again, clearly failed to implement this Court's teaching concerning the issuance of a COA. Instead, it leapfrogged to a conclusion on the issues rather than taking the required procedural step of simply deciding whether a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), had been made, and then ordering full appellate briefing. Thus, the defense's negligible challenge to Dr. Gripon and the catastrophic unpreparedness of Dr. Quijano; the failure to competently challenge the holding of King's trial in Jasper; and the utter failure to present psychiatric evidence when King's background cried out for it, stand un-remedied because of the Fifth Circuit's failure to observe this Court's prior instructions. Providing the Fifth Circuit once more with further clear direction for the conduct of habeas corpus proceedings, and particularly appellate review of those proceedings, will not only serve the interests of individual litigants, but reduce the likelihood that this Court will continue to be called on repeatedly to resolve aberrant interpretations of its precedents.

For the forgoing reasons, the Court should grant the petition for writ of certiorari to consider the important questions presented by this petition, vacate the judgment below, and/or remand it for further consideration in light of *Buck*.

Respectfully Submitted,

s/s A. Richard Ellis

* A. Richard Ellis

75 Magee Avenue
Mill Valley, CA 94941
TEL: (415) 389-6771
FAX: (415) 389-0251

* Counsel of Record,
Member, Supreme Court Bar

October 1, 2018.