CAPITAL CASE

No. 18-8214

In the Supreme Court of the United States

CHARLES D. RABY,

PETITIONER,

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

RESPONDENT.

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

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PETITION FOR REHEARING

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July 5, 2019

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PETITION FOR REHEARING AND SUSPENSION

Pursuant to Rule 44.2 of the Rules of the United States Supreme Court, Charles Raby respectfully petitions for rehearing of this Court's June 10, 2019 Order denying his petition for a writ of certiorari, and for suspension of the Court's decision on rehearing pending its decision on the recently filed petition for certiorari in *Halprin v. Davis*, No. 18-9676 (filed June 12, 2019). Halprin has petitioned this Court to review the United States Court of Appeals for the Fifth Circuit's intractable adherence to a merits-based Certificate of Appealability ("COA") analysis even after this Court's admonishments in a line of cases including, most recently, *Buck v. Davis,* 137 S. Ct. 759 (2017). Review of Raby's case was short-circuited in the same manner, thus the decision below is emblematic of the Fifth Circuit's flawed COA practice.

REASONS FOR GRANTING THE PETITION FOR REHEARING OR SUSPENSION

I. Intervening circumstance warrant rehearing of the denial of Raby's petition for a writ of certiorari and suspension of the Court's decision on rehearing pending its decision in *Halprin*.

Rule 44.2 of the Rules of the Supreme Court of the United States allows petitioners to file petitions for rehearing of the denial of a petition for writ of certiorari and permits rehearing on the basis of "intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented." Rule 16.3 permits the suspension of a denial of a writ of certiorari on the order of the Court or of a Justice if "there is any reasonable likelihood of the Court's changing its position and granting certiorari." *Richmond v. Arizona*, 434 U.S. 1323, 1326 (1977).

The intervening circumstance in this case is the filing of the *Halprin* petition on June 12, 2019, which demonstrates that Raby is just one of many habeas petitioners who has been denied the right to an appeal by the Fifth Circuit's continued misapplication of this Court's straightforward COA standard. Halprin, like Raby, challenges a Fifth Circuit opinion denying a COA *after deciding the underlying merits* of his claims. The Fifth Circuit determined that Halprin's claim under *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987), did not suffice to show he is innocent of the death penalty and "thus conclude[d] that jurists of reason would not debate the district court's determination that Halprin's *Enmund*/*Tison* claim is procedurally barred." *Halprin v. Davis*, 911 F.3d 247, 259 (5th Cir. 2018).

Raby raised the same issue of improper COA merits analysis in his petition's second Question Presented, requesting reversal on the issue of "the proper treatment of Raby's Rule 60(b)(6) [of the Federal Rules of Civil Procedure] motion premised on *Martinez*." Cert. Pet. at I, 11, 27–28, *Raby v. Davis,* No. 18-8214 (Feb. 28, 2019) ("*Raby* Petition"). As described below, the Fifth Circuit's COA analysis in Raby's case was identical to that in *Halprin* in putting the merits cart in front of the debatability horse. This Court has admonished the Fifth Circuit for "invert[ing] the statutory order of operations and 'first decid[ing] the merits of an appeal, . . . then justif[ying] its denial of a COA based on its adjudication of the actual merits.'" *Buck*, 137 S. Ct. at 774. Indeed, this Court has corrected the Fifth Circuit's COA analysis multiple times. *See id.*; *Tennard v. Dretke*, 542 U.S. 274, 283 (2004); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *Slack v. McDaniel*, 529 U.S. 473, 483 (2000); *see also* Cert. Pet.

at 13–15, 29–37, *Halprin v. Davis*, No. 18-9676 (June 12, 2019) ("*Halprin* Petition") (discussing these and other cases).

In *Buck*, this Court emphasized that the COA determination is a "threshold" inquiry and "not coextensive with a merits analysis." 137 S. Ct. at 773. As the Court explained:

> the question for the Fifth Circuit was not whether Buck had "shown extraordinary circumstances" . . . . 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 merits of [the] claims," and ask "only if the District Court's decision was debatable.

Id. at 774 (citing *Miller–El*, 537 U.S. at 336–37) (internal citations omitted).

In *Buck*, this Court noted that the Fifth Circuit had "sidestep[ped]" the threshold inquiry even though the court had *"phrased its determination in proper terms"* because "it reached that conclusion only after essentially deciding the case on the merits." *Id.* at 773 (emphasis added). This Court had previously rebuked the Fifth Circuit for "paying lipservice to the principles guiding issuance of a COA," but "proceed[ing] along a distinctly different track"— "invok[ing] its own restrictive gloss" on the merits of the petitioner's constitutional claim at the COA stage. *Tennard*, 542 U.S. at 283.

The bar for debatability is low: "[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 petitioner will not prevail." *Id.* (quoting *Miller-El*, 537 U.S. at 338) (internal quotation marks omitted). *Halprin* and Raby's case

demonstrate that, despite the Court's repeated admonitions, the Fifth Circuit continues to "place[] too heavy a burden on the prisoner *at the COA stage*." *Buck*, 137 S. Ct. at 774.

The Fifth Circuit's approach is not only explicitly contrary to the Court's COA jurisprudence, it is also an extra-jurisdictional exercise: "When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." *Id*. at 773 (quoting *Miller–El*, 537 U.S. at 336–37) (internal quotation marks omitted).

Halprin's petition, filed after this Court denied *certiorari* in this case, is an intervening development demonstrating that Raby's case is one of many in which the court below has disregarded this Court's several attempts to correct the Fifth Circuit's flawed COA practice.

II. The *Halprin* and *Raby* petitions both demonstrate the Fifth Circuit's noncompliance with this Court's rulings.

Raby's sentencing was marred by trial counsel's failure to conduct an adequate investigation and fundamental misunderstanding of the law and facts at issue. On the issue of "future dangerousness,"[1] Raby's trial counsel—like the defense counsel in *Buck*—made the questionable decision to present the testimony of Dr. Walter Quijano, a psychologist whose views on future dangerousness had in numerous prior

[1] "Future dangerousness" is one of the "special issues" that a Texas jury must find to exist—unanimously and beyond a reasonable doubt—before a defendant may be sentenced to death. *See* Tex. Code Crim. Proc. art. 37.071 § 2 (West 2013).

capital trials helped the State persuade jurors to impose the death penalty. *Raby v. Davis*, 4:02-cv-00349 (S.D. Tex. Aug. 4, 2017), ECF No. 31-21, p. 24 (Trial Tr.). *Testifying for the defense*, Dr. Quijano opined that only death could keep society safe from Raby and improperly labeled Raby a psychopath, a sociopath, and antisocial. *Id*. at pp. 37–39, 41. This Court later discredited Dr. Quijano's opinions and methods in *Buck*, the same case in which it most recently admonished the Fifth Circuit for its handling of a COA. *See Buck*, 137 S. Ct. at 775–78. Raby raised an ineffective assistance of counsel claim, newly allowed under *Martinez v. Ryan*, 566 U.S. 1 (2012), via a Rule 60(b) motion for reconsideration, the same vehicle and claim as in *Buck*, 137 S. Ct. at 767.

Halprin is also challenging his death sentence, arguing that he should be deemed ineligible for the death penalty given his limited role in the robbery that resulted in his sentence. He asserts that he was a minor participant in the robbery, did not kill the officer who died during the robbery, and did not exhibit reckless disregard for human life. *Halprin* Petition at 4–8. In both Raby's and Halprin's cases, the Fifth Circuit made extra-judicial findings, without a hearing or record, regarding the "merits" of the cases. In both cases, in denying the habeas petitioner's motion for a COA, the Fifth Circuit made "ultimate merits determinations the panel should not have reached." *Buck*, 137 S. Ct. at 774 (citing *Miller–El*, 537 U.S. at 327, 348).

Indeed, in both Raby's and Halprin's cases, the Fifth Circuit merely paid lip service to this Court's COA standard before applying its own improper standard. *See Tennard*, 542 U.S. at 283 (noting that Fifth Circuit had been "paying lip service

to the principles guiding issuance of a COA" before "proceed[ing] along a distinctly different track," and "invoke[ing] its own restrictive gloss on" this Court's rulings to justify finding an issue not debatable). In Halprin's case, referencing the legal standard applicable to the argument that his innocence excused any procedural default, the Fifth Circuit ruled:

> Halprin has not shown . . . that a failure to address his claim will result in a fundamental miscarriage of justice. . . . We thus conclude that jurists of reason would not debate the district court's determination that Halprin's *Enmund/Tison* claim is procedurally barred.

Halprin, 911 F.3d at 259.

Raby's case hinged on whether extraordinary circumstances existed to hear his claims under Rule 60(b) of the Federal Rules of Civil Procedure. The Fifth Circuit again leapt to the merits—*i.e.*, extraordinariness:

> A "change in decisional law after entry of judgment does not constitute [extraordinary] circumstances and is not alone grounds for relief from a final judgment." Hence, the district court correctly determined that the change in decisional law effected by *Martinez* and *Trevino*, without more, did not amount to an extraordinary circumstance.

Raby v. Davis, 907 F.3d 880, 884 (5th Cir. 2018) (Pet. App'x F at 4) (quoting *Adams v. Thaler*, 679 F.3d 312, 319 (5th Cir. 2012)). The Fifth Circuit then concluded that, "[b]ecause there are no extraordinary circumstances meriting Rule 60(b)(6) relief, Raby's application for COA is DENIED." *Id.* at 885 (Pet. App'x F at 6).

The Fifth Circuit's approach in Raby's case is no different from its much-criticized approach in *Buck,* which also centered on extraordinariness, and in which this Court held:

> Initial examination of those facts reveals that they are not extraordinary at all in the habeas context. Numbers 1-3, 7, and 8 are just variations on the merits of Buck's IAC claim, which is at least unremarkable as far as IAC claims go. Buck's IAC claim is not so different in kind or degree from other disagreements over trial strategy between lawyer and client that it counts as an exceptional case. . . . Buck has not demonstrated that jurists of reason would debate whether his case is exceptional under Rule 60(b)(6). The request for a COA is DENIED.

Buck v. Stephens, 623 F. App'x 668, 673 (5th Cir. 2015), *rev'd and remanded sub nom., Buck v. Davis*, 137 S. Ct. 759 (2017).

The Fifth Circuit followed precisely the same inverted approach in Raby's case, using the same language in its opinion denying COA: "Because there are no extraordinary circumstances meriting Rule 60(b)(6) relief, Raby's application for a COA is DENIED." *Raby*, 907 F.3d at 885 (Pet. App'x F at 6). As the University of Texas's Capital Punishment Center noted in its amicus brief in support of Raby's petition, the Fifth Circuit's inverted approach clearly "placed too heavy a burden on the prisoner *at the COA stage*." Brief for Capital Punishment Center of the University of Texas School of Law as *Amici Curiae* in Support of Petitioner at 23–27, *Raby v. Davis*, No. 18-8214 (Apr. 3, 2019) (quoting *Buck*, 137 S. Ct. at 774).

III. Compelling evidence in Raby's and Halprin's petitions shows that the Fifth Circuit's noncompliance with this Court's rulings is systematic.

At the core of both Raby's case and Halprin's applications to this Court is the near impossibility of obtaining a COA from the Fifth Circuit. Statistical data demonstrates how extensively the Fifth Circuit continues to forestall judicial review. In his petition for writ of certiorari, Duane Buck presented data showing that, between January 2011 and January 2016, the Fifth Circuit granted a COA on any

issue in only 17 of 93 capital cases brought under 28 U.S.C. § 2254. Cert. Pet. at 26 & App'x F, *Buck v. Davis*, No. 15-8049, 2016 WL 3162257 (Feb. 4, 2016). During that same period, two other circuits with significant capital habeas dockets—the Eleventh and Fourth Circuits—both granted COAs at a far higher rate. *Ibid.*

Halprin demonstrates in his petition for writ of certiorari that, since *Buck*, the Fifth Circuit has decided at least 40 cases at the COA stage. *See Halprin* Petition at 34 & App'x D. The Fifth Circuit denied a COA to 27 of the 40 petitioners listed by Halprin (28 of 41, counting Raby)—a denial rate of 68 percent. *Id.* Even more troubling, although *Buck* was a Rule 60(b) case raising a claim under *Martinez v. Ryan*, 566 U.S. 1 (2012), even now, the Fifth Circuit has never granted a COA on such a claim, although at least ten Rule 60(b) cases raising a *Martinez claim*—including Raby's—have sought one. *Raby* Petition at 27 n.7 & App'x G (analyzing the 5th Circuit COA decisions). Meanwhile, since *Buck*, the Fourth Circuit has granted all capital COA petitions on its docket, and the Eleventh Circuit has continued to grant over 90% of petitions on its docket. *Id.* at App'x H.

A habeas petitioner's difficulties in obtaining a COA from the Fifth Circuit are exacerbated by the lower court's idiosyncratic drafting and practice requirements. The Fifth Circuit still demands full adversarial briefing on COA motions, despite *Buck*. In that circuit, what should be briefing of a mere threshold inquiry is instead a one-shot "hail Mary" submission that requires as much or more briefing than the appeal itself would. Halprin's analysis of all post-*Buck* COA grants highlights several concerning procedural trends, including: full adversarial briefing, multiple reply

briefs, multiple requested and accepted State extensions for lengthy oppositions, and lengthy briefs by petitioners. *Halprin* Petition at 30–31 & App'x D. Moreover, in the rare cases in which the Fifth Circuit grants a COA, it limits briefing on the *actual* appeal to mere supplemental briefing, making the appeal itself a mere afterthought. *Id.*

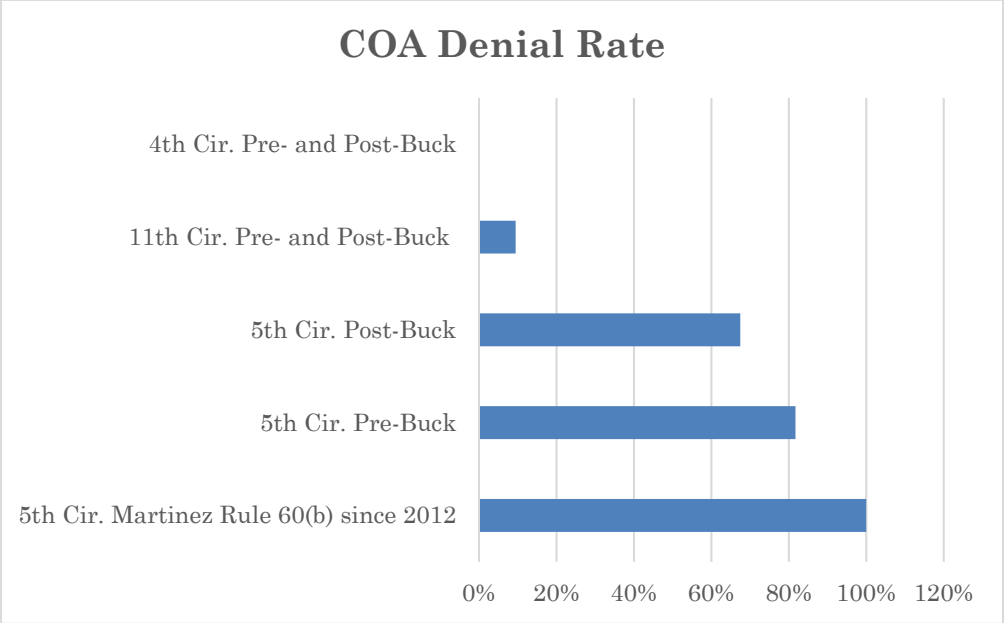
In Raby's case, COA briefing lasted seven months, including two extensions. Raby's brief was 64 pages long, the State's response was 48 pages, and Raby's reply was 16 pages. *See* Application for COA, *Raby v. Davis*, No. 18-70018 (July 2, 2018); Response in Opposition to Application for a COA, *Raby v. Davis*, No. 18-70018 (Aug. 30, 2018); Reply to Response in Opposition, *Raby v. Davis*, No. 18-70018 (Sept. 12, 2018). These practices undermine Congress's goal of streamlining appellate review in habeas corpus cases, in which the COA is supposed to demand only an initial threshold showing to justify an appeal.

CONCLUSION

Rehearing or suspension is appropriate here, because Raby has met this Court's requirements for both rehearing under Rule 44.2 and suspension under Rule 16.3. Rehearing is justified because the filing of the *Halprin* Petition is an intervening event that collects compelling evidence relevant to Raby's second Question Presented. Specifically, the petition collects data on post-*Buck* COA cases, including not only their outcome but also the arduous merits briefing they require in the Fifth Circuit. Suspension is justified because, considered together, the *Halprin* and *Raby* cases, along with the evidence of other cases they present in their petitions,

illustrate that the Fifth Circuit systematically denies COA petitioners their right to an appeal. Because there is a pressing need to address the Fifth Circuit's COA practice, there is a reasonable likelihood that the Court will change its position and grant certiorari.

Petitioners' evidence of COA denial rates alone, as presented by Raby and Halprin, demonstrates the Fifth Circuit's systematic rate of denial:[2]



[2] Details and sources for these figures are as follows:

5th Cir. *Martinez* Rule 60(b) since 2012	**5th Cir. Pre-*Buck***	**5th Cir. Post-*Buck***	**11th Cir. Pre- and Post-*Buck***	**4th Cir. Pre-and post-*Buck***
16 out of 16 cases denied (*Raby* petition, App'x G)	76 out of 93 cases denied (*Buck* petition App'x F)	27 out of 40 cases denied (*Halprin* petition)	133 out of 147 cases denied (*Raby* petition App'x H)	19 of 19 cases denied (*Raby* petition App'x H)
100%	82%	68%	9.50%	0%

As shown, the Fifth Circuit's COA denial rate is still utterly unaligned with COA treatment in other circuits with significant capital habeas dockets, and the barrier is particularly high for Rule 60(b) *Martinez* cases, of which Raby's is one. Given this evidence, the Court should suspend the rejection of Raby's petition for writ of certiorari and grant rehearing of Raby's petition.

Respectfully submitted,

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July 5, 2019.

CERTIFICATE OF COUNSEL

I hereby certify that this petition for rehearing is presented in good faith and not for delay.

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