NO. _____

In The
UNITED STATES SUPREME COURT

JAVIER YEBRA,
Petitioner-Appellant,

versus

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent-Appellee.

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

PETITION FOR A WRIT OF CERTIORARI

DANALYNN RECER
Attorney for Appellant
Gulf Region Advocacy Center
2307 Union Street
Houston, TX 77007
Phone: (713)869-4722
October 31, 2019

QUESTION PRESENTED

Did the United States Court of Appeals for the Fifth Circuit continue to impose an improper Certificate of Appealability (COA) standard that contravenes this Court's precedent when it denied Mr. Yebra a COA on his motion to reopen the judgment and obtain merits review of his claim that his trial counsel was constitutionally ineffective?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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NOW COMES Petitioner JAVIER YEBRA, by and through undersigned counsel, to seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

Opinions and rulings entered in conjunction with the judgment sought to be reviewed are:

The unpublished opinion of the Court of Appeals denying a Certificate of Appealability, *Yebra v. Davis*, No. 18-11262 (5th Cir. Aug. 2, 2019), is attached as Appendix A.

The Order and Memorandum of the United States District Court for the Northern District of Texas, Amarillo Division, denying Mr. Yebra's Rule 60(b) Motion, *Yebra v. Davis*, No. 2-12-CV-173-D (N.D. Tex. Aug 27, 2018), is attached as Appendix B.

JURISDICTION

The Court of Appeals entered its judgment on August 2, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a state criminal defendant's constitutional rights under the Sixth and Fourteenth Amendments. The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to . . .
> have the assistance of counsel for his defense.

The Fourteenth Amendment provides in relevant part:

> . . . nor shall any State . . . deny to any person within its jurisdiction
> the equal protection of the laws.

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) the 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 OF THE CASE

Mr. Yebra was convicted in Moore County, Texas of aggravated assault with a deadly weapon and the jury imposed a sentence of fifty years. Although there was no dispute that an altercation had occurred, the trial evidence lacked detail and was vague and confusing. During the fight, the victim sustained five wounds—three to the abdomen, one on the arm, and one on the hand. Mr. Yebra sustained abrasions and lacerations on his head. No witness saw a knife or any other weapon and no weapon was ever recovered. The case therefore was heavily dependent on forensic testimony to establish the nature of the wounds and whether they were caused by a deadly weapon, elements critical under state law to prove the charged crime and the range of punishment.

The State relied upon a forensic pathologist, Dr. Thomas Parsons, who examined medical records and pictures and told the jury that the injuries were potentially deadly and had been caused by a knife or knife-like object. ROA 1584-85, 1589.

Mr. Yebra's appointed counsel, who was less than a year out of law school and had been licensed for approximately six months, spoke with Dr. Parsons prior to trial but failed to consult with an independent expert despite the fact the case clearly hinged on the State's expert's opinion. Instead, he merely attempted to get the State's expert to tell the jury that the victim's injuries could have been caused by a bottle. This line of questioning was less than compelling to the jury. Because trial counsel had failed to consult an independent expert, the defense ultimately had no way to rebut Dr. Parsons and the jury was left with the erroneous conclusion that the wounds were caused by a knife and that they were more substantial injuries than they actually were. The effect of this failure resounded throughout Mr. Yebra's trial, misleading the jury on issues relating to his culpability and his sentence.

In post-conviction, Mr. Yebra raised a claim alleging that his trial counsel was ineffective for failing to investigate and consult with an independent forensic expert. Mr. Yebra attempted to prove the prejudice of his trial counsel's error but was stymied because he had no right to habeas counsel and was not allowed access to the evidence in his case. Despite more than diligent efforts, Mr. Yebra was unable to obtain copies of photographs and other documentary evidence he needed to prove prejudice on his claim. He could not, therefore, demonstrate what effective counsel could have proven with the records nor could he have an independent expert review the evidence.

Realizing that he would not be entitled to appointed counsel in post-conviction, Mr. Yebra began to diligently collect records in his case even before his conviction became final. ROA 221. He repeatedly wrote to attorneys, district court clerks, non-profit organizations and family members pleading for assistance. *Id.* In March of 2011, the Texas State Law Library informed Mr. Yebra that they were unable to obtain records in his case because his case files were in the appellate court. ROA 266. Mr. Yebra then contacted the Seventh Court of Appeals, who told him to ask his appellate attorney. In response to a May 13, 2011 letter, his appellate attorney sent him a copy of the clerk's records, but not the documentary evidence.

Still having received no response to his requests and with his state habeas deadline approaching, Mr. Yebra sent a certified letter to the state district court clerk asking for the documentary evidence in his case. He received no response. ROA 267. In desperation, he wrote again to the Texas State Law Library and this time was told they had consulted with the Texas Court of Criminal Appeals (CCA) and were forbidden from photocopying and distributing documentary evidence to him. ROA 270. The Library told Mr. Yebra he should write to the district court clerk.

Mr. Yebra wrote to the CCA explaining the situation and was told to contact the Texas State Law Library. ROA 272. Because he still had not heard back from the state district clerk, Mr. Yebra enlisted family members to call. The clerk informed his family that she was unable to process the request because the documents he sought "are not filed in the above mentioned cause" and that he "may need to contact a different office." ROA 275.

Mr. Yebra wrote again to the Seventh Circuit Court of Appeals and the State Law Library and was again told that they could not help him. ROA 276-77. At a loss of what else he could do, Mr. Yebra wrote several letters to the court reporter but received no response. By this time, Mr. Yebra had been denied in state habeas and his § 2254 petition was already pending.

Refusing to give up, Mr. Yebra reached out to the Director of the Taylor County Law Library[1] to ask if she had any suggestions for him. ROA 463 et seq. The Director of the Taylor County Law Library fortuitously took the time to call the Moore County district clerk and the court reporter. The three of them together were somehow able to locate and copy the documents Mr. Yebra had sought for years. ROA 420. The documents were forwarded to an independent forensic pathologist, Dr. Shaku Teas, who provided Mr. Yebra a declaration. Dr. Teas questioned whether the injuries were in fact caused by a knife and unequivocally stated that the injury to the victim was superficial and not deadly as the State had argued.

Because he was already in federal habeas at the time, Mr. Yebra sought to supplement his pending petition with the new expert declaration. The magistrate judge denied Mr. Yebra's request holding that the district court was precluded from considering Dr. Teas declaration because it had not been presented to the state court. ROA 514. The district court judge adopted the magistrate's recommendation without changes or additions on March 23, 2016. ROA 538-39.

1 At that time, Mr. Yebra was housed in a facility in Taylor County, Texas.

Mr. Yebra requested reconsideration of that decision and also requested a stay of proceedings to allow him to return to the state court to exhaust this additional evidence. He noted that before a federal court imposes a procedural bar, the state court should be permitted, in the first instance, an opportunity to review the merits of the issue. ROA 545. Mr. Yebra rightfully noted that, despite his due diligence, this evidence (Dr. Teas' declaration) was simply unavailable when his previous pleadings were filed. *Id*. In a one page order with no legal analysis, the district court denied Mr. Yebra's request. ROA 549.

Mr. Yebra appealed the denial of other issues in his case and, following affirmance by the Fifth Circuit and denial of *certiorari* by this Court, then filed a *pro se* subsequent post-conviction application in state court. The state court accepted the subsequent filing and reviewed the merits of Mr. Yebra's IAC claim, including Dr. Teas' declaration. The state court ordered trial counsel to respond to the allegations by affidavit and then denied the claim on the merits in an order stating simply that "Applicant's allegations are groundless." The CCA denied review without written order on June 20, 2018. *See In re Yebra*, No. 78,088-02 (Tex.Crim.App. June 20, 2018).

Mr. Yebra then filed a motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b) and requested that the federal district court provide relief from the judgment on the ground that its previous application of a procedural bar (and denial of a stay and abeyance based on the assumption that his evidence could not be exhausted in state court) had proved to be incorrect, and that it was in fact now free to review the merits of his IAC claim. The district court agreed that the state court has indeed issued a "determination of the merits of Yebra's claims" but denied the motion stating merely that Mr. Yebra "has not demonstrated that he is entitled to relief under Rule 60(b)". App. B at 2.

The Fifth Circuit denied a COA on August 2, 2019. App. A.

REASONS FOR GRANTING THE WRIT

In denying Mr. Yebra permission to appeal the District Court's denial of his Motion to Amend, the Fifth Circuit contravened this Court's precedent and continued its "troubling" practice of misapplying the standard for granting COA. Mr. Yebra's case presents the extraordinary circumstance where a federal court's application of a procedural default has proven to be incorrect yet the court has refused to review the state court's merits ruling of a Sixth Amendment claim. On the few occasions where similar circumstances have occurred the Fifth Circuit has decided this issue favorably to Mr. Yebra. That it did not do so here underscores both the extraordinary nature of the case and the erroneous determination that reasonable jurists would not find the issue debatable.

I. THE FIFTH CIRCUIT CONTUINUES TO IMPROPERLY APPLY THE COA STANDARD.

This Court has made clear that the COA inquiry is distinct from an analysis of the merits of a case. To determine whether a COA should issue, "[t]he question is the debatability of the underlying constitutional claim, not the resolution of that debate." *Miller-El v. Cockrell*, 537 U.S. 322, 342 (2003). "Indeed, 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*. at 338; *see also Buck v. Davis*, 136 S. Ct. 759, 773 (2017).

In context of reviewing a COA denial based on a Rule 60(b) motion, this Court has noted that the question is not whether a movant has "shown extraordinary circumstances" or proven entitlement to relief from the judgment. *Id.* at 774. Rather the question is solely whether the District Court's decision as debatable. *Id*.

Like the Fifth Circuit's decision in *Buck*, the lower court cited the correct language but appears to have exceeded its mandate in making that determination. In its cursory opinion, the

court cites *Buck* to establish that the question is whether "reasonable jurists could debate whether the district court abused its discretion in declining to reopen the judgment." App A at 2. However, with no legal analysis whatsoever, the Court then asserts that Mr. Yebra has failed to make this showing citing *Buck*, *Slack v. McDaniel*, 529 U.S. 473 (2000) and *Cullen v. Pinholster*, 563 U.S. 170 (2011). *Buck* and *Slack* discuss the review standard of COAs but it is unclear how either case has any bearing on the factual analysis in Mr. Yebra's case. *Cullen,* on the other hand, does not concern a COA request but rather is about the extent of merits review in federal habeas. But these cases are inapposite.

The judgment Mr. Yebra seeks to reopen in his Rule 60(b) motion was based on a presumption by the district court that has proven to be erroneous and a state court record that is no longer correct. During his initial habeas proceedings, the district court refused to consider the declaration submitted by Mr. Yebra's expert because it had not been presented to the state court. The district court also refused to allow him the opportunity to exhaust that evidence prior to issuing a ruling in his case, assuming that exhaustion would be futile. Instead the district court applied a procedural bar and refused merits review of his full IAC claim. The district court's assumption about how the state court would address exhaustion effectively deprived Mr. Yebra of full federal review of his IAC claim (and later proved to be false).

Rule 60(b) exists specifically to remedy such inequities. As the Fifth Circuit itself has held

> Motions under Rule 60(b) are directed to the sound discretion of the district court, and its denial of relief upon such motion will be set aside on appeal only for abuse of discretion. It is not enough that the granting of relief might have been permissible, for even warranted denial must have been so unwarranted as to constitute an abuse of discretion. ***Nevertheless, the discretion of the district court is not unbounded, and must be exercised in light of the balance that is struck by Rule 60(b) between the desideratum of finality and the demands of justice.*** That same consideration must inform appellate review of a district court's exercise of discretion under Rule 60(b); ***and where denial of relief precludes examination of the full merits of the cause, even a slight abuse may justify reversal***.

Seven Elves v. Eskanazi, 635 F.2d 396, 402 (5th Cir. 1981) (internal citations omitted) (emphasis supplied).[2]

In Mr. Yebra's case, the application of a procedural bar was incorrect and his subsequent state court litigation demonstrated that there simply was no procedural bar to review of his evidence. As a result, the previous federal habeas judgment was inequitable. Even if the federal district court could have rightly believed that exhaustion in state court was futile at the time Mr. Yebra's case was in federal habeas, it is of no matter. We now know, ***through new facts***—the merits ruling in Mr. Yebra's case—that the district court's belief is no longer correct. This is the issue that is clearly debatable and which the circuit court below failed to address.

Indeed, not only does the issue itself demonstrate its debatability but courts that have addressed the issue have ruled in Mr. Yebra's favor, including the Fifth Circuit. *See Ruiz v. Quarterman,* 504 F.3d 523, 531 (5th Cir. 2007) ("[W]e examine the equities of re-considering a dismissal of a claim now freed of the baggage threatening the jurisdiction of the court…Texas has now had the opportunity to review the claim and did so on its merits.").

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2 The judgment from which Mr. Yebra sought relief is not a default judgment, but the same principles expressed by the *Seven Elves* Court apply, and for the same reasons. Much like how default judgments that preclude merits review are not favored, applications of procedural defaults to potentially meritorious constitutional claims for habeas relief that have the same effect are likewise not favored where avoidable. *See, e.g., Michigan v. Long*, 463 U.S. 1032, 1041 (1983) (requiring "clear and express" reliance on state law ground to preclude federal merits review); *Prieto v. Quarterman*, 456 F.3d 511, (5th Cir. 2006) (a court should not lightly *sua sponte* apply a procedural default in a habeas corpus proceeding). Indeed, *Seven Elves* itself did not concern what the Court determined to be a default judgment, but merely a judgment that "[bore] many of the characteristics of a default judgment," primarily the fact that it "seem[ed] clear that the full merits of the cause were not examined." *Seven Elves*, 635 F.2d at 403. Because the merits of Mr. Yebra's potentially meritorious constitutional claim were never reached by the district court, this case, likewise, bears characteristics of a default judgment, particularly given the circumstances surrounding the default and the State action that precipitated it.

In fact, in *Balentine v. Thaler*, 626 F.3d 842 (5th Cir. 2010) the Fifth Circuit explicitly held that a Rule 60(b) motion should be granted in a case like Mr. Yebra's. *See id.* at 847 ("Balentine requested a stay of the federal proceedings so he could return to state court to exhaust the ineffective assistance claim. Such a stay was denied in 2008. **If Balentine actually got a later ruling on the merits from the Court of Criminal Appeals on his *Wiggins* claim, *Ruiz* would be authority supporting his argument that it was error not to grant the Rule 60(b) motion**.") (emphasis added).

Mr. Yebra did just what the Fifth Circuit prescribed in *Balentine*; he got a later state court ruling on the merits. Yet the Fifth Circuit, fully aware of the *Ruiz* and *Balentine* decisions, found the exact issue in Mr. Yebra's case not to be debatable.

Whether the Fifth Circuit simply misapplied *Buck* and *Miller-El* or denied after examining the merits of the case *sub silentio* is of no moment. The paucity of reasoning in the circuit court order's should not shield the lower court from what is clear from the context: the Fifth Circuit continues to misapply the COA standard.

This Court has repeatedly corrected this Court's unduly restrictive approach to granting COAs. See *Buck, supra*; *Tennard v. Dretke*, 542 U.S. 274, 283 (2004); *Miller-El*, 537 U.S. at 327. It should do so again here and summarily reverse Mr. Yebra's case.

II. MR. YEBRA'S CASE IS SUFFICIENTLY SIGNIFICANT AND POTENTIALLY MERITORIOUS AND DESERVES MERITS CONSIDERATION.

Because of the procedural bar the district court erroneously applied to Mr. Yebra's IAC claim, the record contains no fact findings and this Court should remand for further proceedings. *See United States v. Brown,* 571 F.3d 492, n. 1 (5th Cir. 2009) ("As an appellate court, we do not find facts."); *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986) ("If the Court of

Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings.")

However, perusal of the records demonstrates that Mr. Yebra has presented a viable claim which deserves merits consideration. In a case such as this where the State's evidence supporting culpability and punishment rests almost exclusively on forensic evidence, trial counsel has an obligation to seek out expert assistance, independent of the State's expert. *See Elmore v. Ozmint*, 661 F.3d 783 (4th Cir. 2011) (Counsel ineffective where no independent expert was consulted and "forensic evidence was always and obviously vital to the State's case…the circumstances necessitated that the defense work to engender doubt about the forensic evidence."); *see also Soffar v. Dretke*, 368 F.3d 441, 476 (5th Cir. 2004) (Counsel found ineffective where the "State's theory relied heavily on ballistics evidence…[y]et Soffar's defense counsel never even consulted with a ballistics expert.") Because of the conflicting accounts during the investigation of Mr. Yebra's case and the fact that no weapon was ever discovered, the forensic evidence was crucial to culpability and punishment.

The most obvious effect of trial counsel's failure to consult with an independent expert is that the jury was left with the impression that the victim's wounds had to have been made with a knife and the prosecution assured the jury their expert was positive a knife was used. In closing, for example, the State told the jury:

> No knife. How did she get cut? He wants to argue that there was no knife. How did she get cut? Well, the doctor's expert opinion is these wounds were made by a bladed – with a knife or a knife-like object. So we know there was a knife or knife-like object.

ROA 2614.

> The doctor is an expert. He has seen hundreds of knife wounds. He even explained

> to us the little cuts that the knife went in, was turned a little bit, either by the body moving or by the hand on the knife and pulled out. No doubt.

ROA 2617.

Here there is a reasonable probability that, had the jury heard an alternative cause for the injuries from Dr. Teas, at least one juror could have found the forensic testimony created reasonable doubt. *Porter v. McCollum*, 130 S. Ct. 447, 455 (2009).

Trial counsel's omissions failed to address or alert the jury to serious problems with the State's case against Mr. Yebra. For example, one crucial issue was whether there was evidence beyond a reasonable doubt that a deadly weapon was used. Because no knife or other weapon was recovered, the reviewing courts held that a "victim's injuries can, by themselves, be a sufficient basis for inferring that an appellant used a deadly weapon." ROA 481 (citing *Tucker v. State,* 274 S.W.3d 688 (Tex. Crim. App. 2008). According to the courts below,

> [T]here is evidence that Flores suffered five stab wounds that required surgery and a three-week stay in the hospital. At one point she was transferred to ICU when she stopped breathing… [Dr. Parsons] testified that Flores's injuries could have caused death. One of the wounds lacerated her liver, which required surgery and posed a serious risk of severe blood loss and infection within the abdominal wall.

ROA 481.

Had trial counsel consulted with and presented an independent expert, the jury and the appellate courts would have realized that this evidence was utterly inaccurate. An independent forensic expert like Dr. Teas would have informed the jury, for example, that in fact the "liver injury was superficial with minimal bleeding" and "was not lethal." ROA 470. Contrary to what the jury heard, Dr. Teas pointed out that the medical records themselves showed minimal bleeding of 150-200 ml and that "a woman loses about 500 ml during childbirth." ROA 470. Hospital records confirm this amount of blood and note that there was no ongoing bleeding. ROA 817.

Though the jury was informed that that the victim spent three weeks in the hospital, this assertion is simply false. Contrary to the courts' averments, Dr. Teas noted that medical records show the victim was admitted on November 29th and discharged on December 4th, a period not even close to a three week stay. ROA 470. Records also show that within 72 hours she was transferred to the regular floor of the hospital where she did extremely well, eating a regular diet, walking around with no difficulty and requiring minimal pain medication. ROA 831.

There is also no evidence (as the prosecution presented at trial) that the victim stopped breathing and was transferred to the ICU. Instead, hospital records indicate that during an exploratory laparotomy the victim had impaired oxygen saturation which improved by itself during the procedure. ROA 818. Intraoperative chest X-rays showed no explanation for the findings and the reporting doctor concluded it was a lung issue "consistent with her 5-pack-year smoking history…as well as lying in an alcoholic stupor for approximately 6 hours preoperatively." ROA 818.

Moreover, the hospital records themselves contradict the evidence of severe injury the State presented to the jury. According to the emergency physician records reviewed by Dr. Teas, every single laceration observed by the hospital was considered to be superficial. ROA 842, 844, 847. Had trial counsel consulted an independent medical expert, the jury would have learned that the State's account of the injuries were wildly inaccurate and it is reasonably probably that one juror would have a reasonable doubt about whether the evidence supported use of a deadly weapon.

Finally, there can be little doubt that trial counsel's ineffectiveness prejudiced Mr. Yebra's sentencing. After introducing a wealth of erroneous evidence about the victim's injuries at guilt phase, the State highlighted it again in its plea for a lengthy sentence. In closing argument at

punishment the State asked the jury to look at the pictures of the wounds and assess years in prison for each wound. ROA 1668 (telling the jury to give Mr. Yebra two years for one wound, ten years for each of the two additional wounds and five years more years for hitting the liver, five years for the arm laceration and two more for the cut finger). Thus, even if the prejudice of trial counsel's error fails to result in a new trial, it is undeniable that the prominence of the false evidence about the victim's injuries in sentencing prejudiced the jury's determination.

CONCLUSION

For all of the foregoing reasons, Mr. Yebra's case is extraordinary. At a minimum, reasonable jurists could so conclude, which means a COA must issue. Mr. Yebra respectfully requests that this Court grant *certiorari* or summarily reverse.

Respectfully Submitted,

/s/ Danalynn Recer
Danalynn Recer
Counsel for Javier Yebra
Texas Bar No. 00792935
Gulf Region Advocacy Center
2307 Union St.
Houston, Texas 77007
Office: (713)869-4722
Fax: (713)880-3811
Cell: (832)969-0444

CERTIFICATE OF SERVICE

I hereby certify that a copy of this document has been served, upon counsel for Respondent on this 31st day of October, 2019, via Fed Ex, addressed to:

Elizabeth Goettert
Adham Ramzi Bissar
Assistant Attorney General
Office of the Attorney General of Texas
300 W. 15th Street
William P. Clements Building
Austin, Texas 78701

/s/ Danalynn Recer
Danalynn Recer
Counsel for Mr. Javier Yebra

Dated: October 31, 2019