No. _____

In The
Supreme Court of the United States

MARK SHUMSKI,

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a prisoner entitled to a certificate of appealability (COA) on a claim for which other jurists have reached different conclusions from the district court on similar facts?

PARTIES

Petitioner: Mark Shumski

Respondent: Lorie Davis, Texas Department of Criminal Justice, Correctional Institutions Division

RELATED PROCEEDINGS

Shumski v. Davis, No. 4:19-CV-293-Y, United States District Court for the Northern District of Texas. Judgment entered February 4, 2019.

Shumski v. Davis, No. 19-10184, United States Court of Appeals for the Fifth Circuit. Order denying a certificate of appealability entered on October 9, 2019.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Mark Shumski respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's order denying a certificate of appealability was unpublished, but is reprinted in the Appendix. Pet. App. 1-2. The federal district court's opinion denying Petitioner's 2254 petition and certificate of appealability is also available in the Appendix. Pet. App. 3-21, and at *Shumski v. Davis*, No. 4:18-CV-293-Y, 2019 U.S. Dist. LEXIS 17192 (N.D. Tex. Feb. 4, 2019). Finally, the Texas trial court's findings of fact and conclusions of law arising from Petitioner's state habeas petition have been reprinted in the Appendix. Pet. App. 22-44.

JURISDICTIONAL STATEMENT

The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). *See Hohn v. United States*, 524 U.S. 236, 253 (1998) ("We hold this Court has jurisdiction under § 1254(1) to review denials of applications for certificates of appealability by a circuit judge."). The court of appeals below denied Petitioner's request for a certificate of appealability on October 9, 2019. Pet. App. 1. This petition has been filed within 90 days of this order

and is therefore timely. *See* Sup. Ct. R. 13.1; Sup. Ct. R. 30.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides, in relevant part: "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

Section 2253(c) of Title 28 of the United States Code provides:

> (c)(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 the process issued by a State court; or
>
> (B) the final order in a proceeding under 2255.
>
> (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.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Section 2254(d) of Title 28 of the United States Code provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) 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.

STATEMENT OF THE CASE

Procedural Overview

Petitioner Mark Shumski, a Texas prisoner, seeks review of the denial of a certificate of appealability (COA) in connection with his request for federal habeas relief pursuant to 28 U.S.C. § 2254. Petitioner moved in the district court to vacate his conviction and 60-year prison sentence for continuous sexual abuse of a child on the basis that he was deprived of his Sixth Amendment right to the effective assistance of counsel. Pet. App. 4-5. Specifically, among his claims, Petitioner alleged that his trial counsel failed to object or otherwise seek exclusion of improper testimony that the child complainant was making truthful allegations of sexual abuse. Pet. App. 5. A number of Texas appellate

courts have found that the failure to seek exclusion of precisely this kind of testimony constituted ineffective assistance of counsel.

But the district court denied Petitioner's claim on the merits and further denied him the opportunity to even appeal its decision by refusing to issue a COA. Pet. App. 19. Petitioner then sought a COA in the Fifth Circuit, but the court of appeals denied his request in a perfunctory opinion. Pet. App. 3-4.

Trial Facts

Petitioner was accused of sexually abusing his stepdaughter. The district court borrowed the factual summary from the appellate court, which was as follows:

> The State charged [Petitioner] with committing two or more acts of sexual abuse against A.G. "from on or about February 16, 2008[,] through May 16, 2011." Specifically the State alleged that [Petitioner] had committed the offense of indecency with a child by contact and that he had committed aggravated sexual assault by penetrating A.G.'s sexual organ with his finger.
>
> A.G. testified that [Petitioner] sexually abused her for about three years before she finally told her mother. She said that, before the time that [Petitioner] had married her mother, [Petitioner] would come into her room at night, slip his hand underneath her clothes and touch her vagina or insert his finger into

> her vagina. A.G. testified that even though she told [Petitioner] "no" and told him that she did not like what he was doing to her, [Petitioner] continued to sexually abuse her.

Pet. App. 4.

There was neither physical evidence nor a confession to corroborate her claim of abuse. But numerous State's witnesses sought to bolster her claim by testifying as to their belief that the child was telling the truth—testimony that was patently inadmissible under well-settled precedent.

Forbidden Testimony

K.G.

K.G., the mother of the child complainant, testified to the content of her daughter's outcry. She then testified as to her opinion as to the truthfulness of this outcry:

> I believed her 100 percent with all my heart that she was—there's no way she was lying to me.

(ROA. 356.)

On cross examination, she further stated:

> My daughter had no reason to lie to me.

(ROA. 392.)

> I believed my little girl with all my heart. She had no reason to lie.

(ROA. 394.)

Kimberly Lowery, CPS Investigator

Kimberly Lowery, a Child Protective Services (CPS) investigator, testified that A.G. had participated in a forensic interview at the Wise County Sheriff's Office. (ROA. 494-495.) Lowery watched via a live video feed. (ROA. 496.) The State then asked about her "demeanor" during the interview:

> Q: How would you describe [A.G.'s] demeanor during the interview:
>
> A: Her demeanor was very—
>
> You could tell the things that was hard to talk about. She was very—almost—.
>
> She—She seems embarrassed kind of having to talk about it.
>
> During the—interview, I mean she was very—
>
> *I mean her statements were very credible.* She was able to give a lot of details in her interview. And she was also very consistent with her statements. It was definitely something that you could see was very hard for her to talk about during the interview.

(ROA. 496.) (emphasis added).

Lowery also testified indirectly that her supervisor, Jamey Holtzen, found A.G.'s allegations of sexual

assault to be true. Lowery twice noted that it was Holtzen who had actually conducted the forensic interview, and Holtzen had ultimately approved Lowery's suggested CPS administrative finding of "reason to believe sexual abuse." (ROA. 502, 513.)

Investigator Reynolds

Investigator Reynolds of the Wise County Sheriff's Office was the assigned investigator to this case. He also watched A.G.'s forensic interview. (ROA. 520.) On redirect, the following colloquy took place between Reynolds and the prosecutor:

> Q: Investigator Reynolds, let me ask you if you believe that it was a false allegation, would you write an arrest warrant to have somebody arrested?
>
> A: No I would not.

(ROA. 527-528.)

Terry Ivy

Terry Ivy was A.G.'s softball coach for three years. (ROA. 532.) Petitioner helped out in practices. (ROA. 533.) She testified that on one occasion as Petitioner had tried to assist her with her batting stance, A.G. got uncharacteristically angry with Petitioner and ran off from him. (ROA. 534-535.) The State engaged in the following colloquies with Ivy regarding A.G.'s character for truthfulness on direct and redirect:

Q: Did she ever tell you anything that you thought was a lie?

A: No.

(ROA. 534.)

* * *

Q: Is there any question in your mind that this child would know the difference between right and wrong, even though that it would be a terrible thing to falsely accuse somebody of something like this?

A: Oh, absolutely; yes.

(ROA. 543.)

And on cross examination, defense counsel elicited the following testimony:

Q: Okay. I'm just saying, you're not—you're not telling the jury that she never lies. You're just saying that you didn't—everything that you all ever talked about, you felt like she was being truthful with you; right?

A: Yes; very.

(ROA. 539-540.)

State Petition

Petitioner sought habeas relief in the state trial court. Pet. App. 5. The court denied Petitioner's request and entered findings of fact and conclusions of law. Pet.

App. 22-33. The trial court concluded that the decision not to object to the forbidden child-bolstering testimony was a reasonable trial strategy designed to "avoid emphasizing the witness's testimony by objecting." Pet. App. 33. It further found that any error did not cause prejudice. Pet. App. 34.

Federal Petition

Petitioner then sought relief in federal court. The district court found Petitioner had properly exhausted the child-bolstering claim. Pet. App. 5. The district court denied the claim on the merits. Pet. App. 17-18. It concluded that the state trial court had not unreasonably applied *Strickland* when it found that trial counsel's failure to object to blatantly inadmissible child-bolstering testimony had been based on a reasonable trial strategy. Pet. App. 17-18. The district court did not make any express findings as to the prejudice prong of *Strickland*. Pet. App. 17-19.

Denial of COA

In the same order, the district court *sua sponte* denied Petitioner a COA, concluding that reasonable jurists could not question its resolution of Petitioner's claims. Pet. App. 19. Petitioner then requested a COA from the Fifth Circuit, which was denied by a circuit judge. Pet. App. 1-2. The judge identified the applicable COA standard but curtly concluded, without analysis, that Petitioner "has not made the requisite showing." Pet. App. 2.

This petition follows.

REASONS FOR GRANTING THE PETITION

I. Divergent outcomes among jurists on the same issue should alone entitle a prisoner to a certificate of appealability (COA).

The certificate of appealability hurdle is low. This Court has held that a petitioner need only present "something more than the absence of frivolity" to be entitled to a COA. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). "[A] COA does not require a showing that the appeal will succeed." *Id.* Rather, Petitioner need only show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal citations omitted).

Petitioner need not even demonstrate that "some jurists would grant the petition." *Miller-El*, 537 U.S. at 338. If this were the required showing, a court would have to conduct a complete merits analysis, which "[i]n fact, the statute forbids." *Id.* at 336; *see Buck v. Davis*, 137 S. Ct. 759, 773 (2017) ("[t]he COA inquiry, we have emphasized, is not coextensive with a merits analysis"). Petitioner must only show that jurists of reason would find the claim "*debatable*." *Slack*, 529 U.S. at 484. And in this process which countenances only a limited review—"a claim can be *debatable* even though every jurist might agree after the COA has been granted and the case has received full consideration,

that the petitioner will not prevail." *Miller-El*, 537 U.S. at 338 (emphasis added).

Petitioner should have cleared this COA hurdle by a substantial margin. The district court upheld the state court's finding that trial counsel's failure to object to blatantly inadmissible child-bolstering testimony[1] reflected a reasonable trial strategy. Pet. App. 17-18. But a reasonable jurist could debate this conclusion. In fact, other jurists have already not only debated but *disagreed* with this finding in similar cases. That is, other jurists have found a trial counsel's failure to object to truth-vouching testimony to be an objectively unreasonable "strategy" in trials involving sexual assault of child. Specifically, a number of Texas appellate courts have held that no sound strategy justifies the failure to object to testimony vouching for the truthfulness of a child complainant's claims of sexual abuse. *See Fuller v. State*, 224 S.W. 3d 823, 836-37 (Tex. App.—Texarkana, 2007); *Sessums v. State*, 129 S.W. 3d 242, 248 (Tex. App.—Texarkana 2004, pet. ref'd.); *Miller v.*

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[1] *See*, *e.g.*, *Ayala v. State*, 352 S.W. 2d 955 (Tex. Crim. App. 1955) ("[O]pinion of a witness as to the truth or falsity of other testimony may not be asked for"); *Schutz v. State*, 957 S.W. 2d, 52, 59 (Tex. Crim. App. 1997) (Expert is not permitted to give an opinion that child complainant's allegations are truthful); *Yount v. State*, 872 S.W. 2d 706, 711 n. 8 (Tex. Crim. App. 1993) ("[V]irtually every jurisdiction which has addressed, in the context of a child sexual assault case, the admissibility as to the truthfulness of the child complainant, has held that such direct testimony is inadmissible."); *Schutz*, 957 S.W. 2d at 72 ("Merely asking questions to cast doubt on upon a witness' character for truthfulness should not ordinarily be sufficient to open the door to evidence supporting the truthfulness of specific allegations").

State, 757 S.W. 2d 880, 884 (Tex. App.—Dallas 1988, pet. ref'd.); *Garcia v. State*, 712 S.W. 2d 249, 253 (Tex. App.—El Paso 1986, pet. ref'd). In each of these cases, the courts found the failure to object to precisely the kind of testimony at issue here satisfied both prongs of *Strickland*. *Fuller*, 224 S.W. 3d at 836-837; *Sessums*, 129 S.W. 3d at 248; *Miller*, 757 S.W. 2d at 884; *Garcia*, 712 S.W. 2d at 253.

Notably, these cases were all decided "on the bare and undeveloped trial records on direct appeal," without the need to even conduct a post-trial hearing to assess whether trial counsel's failure to object had been strategically motivated. *See Fuller*, 224 S.W. 3d at 836-837 (discussing *Sessums* and *Miller*). In each of these cases, the courts concluded that the failure to object to the onslaught of testimony regarding the child's truthfulness could not have rested on a sound trial strategy. *See Fuller*, 224 S.W. 3d at 836 ("[i]n regard to persuasive testimony about the truthfulness of a complainant's allegations: 'there is no conceivable strategy or tactic that would justify allowing this testimony in front of a jury.' " (quoting *Sessums*, 129 S.W. 3d at 248)); *Miller*, 757 S.W. 2d at 884 ("[w]e can glean no sound trial strategy in defense counsel's failure to object to the extensive, inadmissible testimony concerning the only real issue at trial—complainant's credibility."); *Garcia*, 712 S.W. 2d at 253.[2]

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[2] *Garcia* arose on direct appeal following a motion for new trial in which trial counsel testified. *See Garcia*, 712 S.W. 2d at 253. However, this particular claim does not appear to have been the subject of the motion for new trial, which seems to have been

Petitioner acknowledges that these state appellate court decisions did not have to review the *Strickland* question through the AEDPA framework. A federal court must determine whether the state trial court's decision reflected an "unreasonable application" of *Strickland*. *See Harrington v. Richter*, 562 U.S. 86, 101 (2011); 28 U.S.C. § 2254(d)(1). But at the COA stage, Petitioner need only show that the federal court's conclusion was "*debatable*" among jurists of reason. *Miller-El*, 537 U.S. at 336-338 (emphasis added). It certainly was debatable; the state trial court had resolved Petitioner's *Strickland* claim in a manner directly at odds with multiple appellate courts in its state. In these appellate jurisdictions in Texas, trial counsel was legally required to object to victim-bolstering testimony regardless of his strategic inclinations. Furthermore, precedent in the Fifth Circuit itself demonstrates that strategic decisions by trial counsel can be regarded as objectively unreasonable in some circumstances. *See Sanchez v. Davis*, 888 F.3d 746, 751 (5th Cir. 2018) (COA granted on *Strickland* claim where trial counsel's purported strategic reason to not object to inadmissible evidence seemed "wrongheaded," even under the two tiers of deference *Strickland* and AEDPA afford counsel's performance). *Lyons v. McCotter*, 770 F.2d 529, 533-34 (5th Cir. 1985) (concluding that trial counsel's decision to elicit inadmissible testimony was strategic, but nevertheless constituted deficient performance); *Moore v. Johnson*, 194 F.3d 586 (5th Cir. 1994)

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focused on a challenge to the impartiality of a juror. *See id*. at 251-253.

("[t]his Court is . . . not required to condone unreasonable decisions parading under the umbrella of strategy"); *see also Jimenez v. Davis*, 2018 U.S. Dist. LEXIS 154178 at *53 (W.D. Tex. 2018) ("[n]or could a 'strategy' to waive reversible error ever be deemed reasonable").

Given this backdrop, a federal judge could debate (if not fully disagree), with the district court's conclusion that the state trial court had acted reasonably in upholding trial counsel's purportedly strategic decision.[3] That is all Petitioner need show to be entitled to a COA.

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[3] The failure to object was particularly unreasonable here because it amounted to a failure by trial counsel to follow their own stated strategy. Trial counsel Singleton stated in his affidavit that prior to trial, he and co-counsel Belew strategically decided to limit their objections to those that "would likely preserve harmful error." Pet. App. 39. If preserving harmful error was indeed their strategy, then certainly they should have objected to testimony regarding the truthfulness of a child complainant regarding sexual abuse. Such evidence was blatantly inadmissible under well-settled precedent. *See*, *e.g.*, *Schutz*, 957 S.W. 2d at 59; *Yount*, 872 S.W. 2d at 711 & n. 8. Had those objections been overruled, an appellate court could only have upheld the verdict if it had "fair assurance that the error did not influence the jury, or had but slight effect." *Solomon v. State*, 49 S.W. 3d 356, 365 (Tex. Crim. App. 2001). This would have been a difficult hurdle for the State to overcome where, as here, "the only real issue . . . was the credibility of the . . . complaining witness." *Fuller*, 224 S.W. 3d at 823. Trial counsel thus failed to execute its own stated strategy of objecting to evidence that "would likely preserve harmful error." (ROA. 873.)

II. The Fifth Circuit habitually denies COAs, even in cases where the underlying claims are not only debatable but meritorious.

The Fifth Circuit has demonstrated that it has been far too reluctant to issue COAs in light of the standards set forth by the Court in *Slack* and *Miller-El*. Here again, "[t]he question is the debatability of the underlying constitutional claim, not the resolution of that debate." *Miller-El*, 537 U.S. at 342. If reasonable jurists can debate the outcome, a COA should issue—even if every jurist ultimately agrees after full review that Petitioner should not prevail. *Id.* at 337-38. But the Fifth Circuit has continued its myopic approach to COAs, as evidenced by the repeated intervention (or attempted intervention) of this Court. *See Banks v. Dretke*, 540 U.S. 668, 705 (2004) (reversing Fifth Circuit denial of COA); *Tennard v. Dretke*, 542 U.S. 274, 283 (2004) (same); *see also Jordan v. Fisher*, 135 S. Ct. 2647, 2648-2651 (2015) (Sotomayor, J., dissenting, joined by Ginsburg, J., and Kagan, J.) (dissenting from denial of certiorari on the basis that the Fifth Circuit "clearly misapplied our precedents regarding the issuance of a COA" and should have issued a COA).

The Fifth Circuit has even denied COAs in cases where this Court found the court of appeals had ultimately been wrong on the merits of the underlying issue. *See Buck*, 137 S. Ct. at 775-780 (reversing on the merits where the Fifth Circuit had denied even a COA); *Jimenez v. Quarterman*, 555 U.S. 113, 121 (2009) (same); *see also Ibarra v. Thaler* (*Ibarra I*), 687 F.3d 222, 224-227 (5th Cir. 2012) and *Ibarra v. Thaler* (*Ibarra*

II), 691 F.3d 677, 679-686 (5th Cir. 2012) (denying COA on issue later found to be wrong on the merits by the Court in *Trevino v. Thaler*, 569 U.S. 413, 420 (2013)); *Ibarra v. Stephens* (*Ibarra III*), 723 F.3d 599, 600 (5th Cir. 2013) (reversing earlier denial of COA on panel rehearing in light of the Court's decision in *Trevino*).

Denial of COA in *Jimenez* was particularly egregious in light of the unanimous agreement by this Court that the Fifth Circuit had been wrong on the merits of the issue. In *Jimenez*, the district court had held that a state court decision to grant a prisoner the right to file an out-of-time direct appeal did not reset the clock for the statute of limitations under 28 U.S.C. § 2244(d)(1). *Id.* at 115. The Fifth Circuit denied Petitioner a COA, apparently believing that reasonable jurists could not debate this conclusion. *Id.* The Court *unanimously* reversed—not only on the COA question, but on the merits of the underlying issue. *Id.* at 121. The Court held that a state decision did not become "final" until the out-of-time appeal was completed. *Id.* at 121. *Jimenez* thus demonstrates that the Fifth Circuit will deny a COA to a prisoner seeking to litigate claims that are not only debatable, but claims that this Court unanimously concludes are meritorious.

Ibarra is similarly astounding for two different reasons. First, as with *Jimenez*, the Court found that the Fifth Circuit had denied a COA to a litigant presenting a claim for which the Fifth Circuit had, in fact, been wrong on the merits. *See Trevino*, 569 U.S. 413, 420 (2013) (granting certiorari in *Martinez* in light of the denial of COA in *Ibarra*). But perhaps more strikingly,

it denied a COA notwithstanding the fact that there was a dissenting judge to the decision. *See Ibarra I*, 687 F.3d 222 at 227-231 (Graves, J., dissenting); *Ibarra II*, 691 F.3d at 686 (Graves, J., dissenting). In *Ibarra*, the Fifth Circuit thus demonstrated that it will deny meritorious COAs even where there is existing disagreement from another judge in its own court.[4]

The Fifth Circuit thus regularly and routinely denies COAs that raise not only debatable, but often meritorious issues. The Court has repeatedly stepped in and reversed Fifth Circuit denials of COAs. The Fifth Circuit may pay "lipservice to the principles guiding issuance of a COA," as it did below in its perfunctory order denying a COA. *Tennard*, 542 U.S. at 283; Pet. App. 2. But it has adopted an extremely narrow conception of debatability. Decisions are deemed "not debatable" that this Court later concludes are wrongly decided on the merits. Decisions are deemed "not debatable" even though another judge on the same court actively disagrees with it. This Court should grant this petition and

[4] This problem also exists at the district court level in courts across the country. One commentator canvassed district courts in eight circuits where a magistrate court had recommended § 2254 relief but the district judge declined to follow the recommendation. *See* Jonah J. Horwitz, *Certifiable: Certificates of Appealability, Habeas Corpus, and the Perils of Self-Judging*, 17 Roger Williams L. Rev. 695, 721 (2012). Even though the district judge had in fact disagreed with the magistrate judge on the proper resolution of the claims, the district court refused to issue COAs in a staggering 34% of those cases. *Id.*

eliminate the Fifth Circuit's exceedingly narrow view of debatability.

CONCLUSION

The Court should grant the petition and summarily reverse the denial of a COA. Alternatively, the Court should grant the petition and set the case for a decision on the merits.

DATE: January 7, 2019

Respectfully submitted,

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