IN THE SUPREME COURT OF THE UNITED STATES

October Term 2020

David S. Renteria,

Petitioner,

v.

Bobby Lumpkin, Director, Texas Department of Criminal Justice,
Correctional Institution Division,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

CAPITAL CASE
No Execution Date Set

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CAPITAL CASE

QUESTIONS PRESENTED

1. Did the Court of Appeals for the Fifth Circuit deny petitioner a full appeal of the district court's denial of funding under 18 U.S.C. § 3599(f), and this Court's decision in *Ayestas v. Davis*, 138 S. Ct. 1080 (2018), when it held that petitioner was not required to obtain a certificate of appealability ("COA") to appeal the district court's ruling, *see* 28 U.S.C. § 2253(c), but also denied petitioner's motion for leave to brief the issue?

2. Where a capital habeas petitioner seeks funds to investigate evidence disclosed to him in the midst of his habeas corpus proceedings that would have supported an affirmative defense, and a basis for a life sentence, and the lower court assumes the claims related to the defense would be meritorious if substantiated, does the lower court misapply this Court's decision in *Ayestas* when it fails to mention the standard adopted in *Ayestas*, and requires that petitioner prove the results of the investigation would be favorable?

3. Did the Court of Appeals misapply this Court's Eighth Amendment and COA cases when it held that state court does not violate petitioner's rights under the Eighth and Fourteenth amendments when it instructs a capital sentencing jury that the defendant would not be parole eligible for forty years, after refusing to permit the defendant to present truthful testimony showing that he would not be parole eligible for forty-seven-and one-half years?

PARTIES TO THE PROCEEDINGS

Petitioner is David Santiago Renteria, a death-sentenced inmate in Texas, and the appellant below. Respondent is Bobby Lumpkin, Director, Texas Department of Criminal Justice, Correctional Institution Division, who has custody of Petitioner, and was appellee below.

RELATED PROCEEDINGS IN THE LOWER FEDERAL COURTS

- *Renteria v. Davis*, 814 Fed.Appx. 827 (5th Cir. May 21, 2020), docket number 19-70009 (affirming District Court's denial of the Writ of Habeas Corpus)

- *Renteria v. Davis*, 2019 WL 611439 (W.D. Tx., Feb. 12, 2019), docket number 3:15-cv-62 (denial of the Writ of Habeas Corpus)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Constitutions & Statutes

Rules

PETITION FOR A WRIT OF CERTIORARI

Petitioner, David S. Renteria, is a condemned prisoner in the custody of the Texas Department of Criminal Justice, Correctional Institution Division, Polunsky Unit.

He seeks certiorari review of three questions. The issues subsumed in the two questions were presented to the United States District Court in habeas corpus proceedings pursuant to 28 U.S.C. § 2254. The District Court denied relief and a Certificate of Appealability (COA). The questions were next presented to the United States Court of Appeals for the Fifth Circuit in an Application for a COA and in a motion seeking the establishment of a briefing schedule regarding Questions One and Two, that did not require a COA.

The Court of Appeals denied the Motion for a briefing schedule and denied a COA. Despite denying Petitioner the opportunity for full briefing and argument, the Court of Appeals decided the first question presented herein.

Petitioner's Petition for *En Banc* and for Panel Rehearing were each denied. *Renteria v. Davis*, 19-70009 (5th Cir. July 14, 2020).

OPINIONS BELOW

The per curium opinion of the United States Court of Appeals for the Fifth Circuit denying each of the Questions Presented is reported at *Renteria v. Davis*, 814 Fed.Appx. 827 (5th Cir. May 21, 2020).

The District Court's *Memorandum Opinion and Order* are reported. *Renteria v. Davis*, 2019 WL 611439 (W.D. Tx., Feb. 12, 2019).

JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. §§ 2241 and 2254. The court of appeals had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. The judgment of the court of appeals was entered on May 21, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

In relevant part, § 3599(f) of Title 18 provides:

> Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant.

In relevant part, § 2253(c)(2) of Title 28 provides: "A certificate of appealability may issue … only if the applicant has made a substantial showing of the denial of a constitutional right."

STATEMENT OF THE CASE

I. STATE COURT TRIAL, APPELLATE AND POST-CONVICTION PROCEEDINGS

Petitioner was arrested in El Paso, Texas on December 3, 2001 and charged with capital murder in the death of five-year-old Alexandra Flores.

Petitioner was indicted on January 23, 2002 (case number 2002D00230) in the 41st District Court for El Paso County, Texas. The State filed notice of its intent to seek the death penalty on January 24, 2002. Petitioner was represented by counsel from the El Paso Public Defender.

Jury selection began on July 10, 2003. ROA.3980-8093.[1] The guilt-innocence trial commenced on September 8, 2003. ROA.8146-9194. On September 16, 2003, the defense presented its case-in-chief and rested the same day. ROA.9283-9332. On September 17, 2003, the jury returned a verdict finding Petitioner guilty of capital murder and related offenses. ROA.9357-9408.

The penalty trial began on September 18, 2003, and concluded on September 23, 2003. ROA.9418-10088. Based on the jury's answers to the Special Issues set forth in Article 37.071, sections 2(b) and 2(e) of the Texas Code of Criminal Procedure, the trial court sentenced Petitioner to death on October 2, 2003. ROA.10095.

[1] Number preceded by ROA refer to the Record on Appeal in the Court of Appeals.

The Texas Court of Criminal Appeals (CCA) affirmed Petitioner's conviction on direct appeal but reversed his death sentence. *Renteria v. State*, 206 S.W.3d at 689, 710 (Tex. Crim. App. 2006). The CCA held that Petitioner was denied his federal constitutional rights when the trial court prohibited the defense from introducing evidence of their client's remorse after 1) a state expert claimed he would be a future danger because he lacked remorse; and 2) the state argued during closing that Petitioner made no statement of remorse. *Id*. at 694-99. The case was thus remanded for a new punishment trial. *Id*. at 710.

Jury selection began in Petitioner's penalty retrial on October 10, 2007, and concluded on January 16, 2008. ROA.14685, 14737. Renteria was again represented by the El Paso Public Defender.

The State's case was presented between April 22 through 28, 2008. ROA.18990-20033. The defense began presentation of its case on April 29 and rested on May 3, 2008. ROA.20061-20816. A death verdict was returned on May 7, 2008. ROA.20875-20972. Based upon the jury's answers to the special issues submitted under Article 37.071, sections 2(b) and 2(e) of the Texas Code of Criminal Procedure, the trial court again sentenced Petitioner to death on May 14, 2008. ROA.20979.

A direct appeal was filed on January 6, 2010. The CCA denied relief on all claims. *Renteria v. State*, No. AP-74,829, 2011 WL 1734067 (Tex. Crim. App.

May 4, 2011). Rehearing was denied in September 2011. This Court denied certiorari in March 2012. *Renteria v. Texas*, 565 U.S. 1263 (Mar. 19, 2012).

State post-conviction proceedings were filed and denied. In August 2014, the CCA received Petitioner's state post-conviction petition after the trial court denied relief on all claims, and in December 2014 affirmed the denial. *Ex parte Renteria*, No. WR-65,627-02 2014 Tex. Crim. App. Unpub. LEXIS 1138 (Tex. Crim. App., Dec. 17, 2014).

II. PROCEEDINGS IN THE FEDERAL DISTRICT COURT AND IN THE COURT OF APPEALS

On March 30, 2015, undersigned attorney Michael Wiseman was appointed pursuant to the Criminal Justice Act to represent Petitioner in his federal habeas proceedings in the Western District of Texas (El Paso), the Honorable Frank Montalvo presiding. ROA.22, *Renteria v. Davis*, 3:15-cv-00062-FM (W.D. Tex.).

The Third Question presented herein was presented to the District Court.

On February 13, 2019, the District Court issued an opinion denying habeas relief and a certificate of appealability. ROA.829, 997. On April 10, 2019, the District Court denied Renteria's motion to amend the judgment. ROA.1026. Renteria filed a notice of appeal on May 6, 2019. ROA.1040. A motion pursuant to Fed. R. Civ. P. 59 was timely filed and denied on April 10, 2019.

A timely Notice of Appeal to the Fifth Circuit was filed. As noted, the Court of Appeals affirmed the District Court's denial of the Petition.

III. FACTS RELEVANT TO THE QUESTIONS PRESENTED

A. Questions One and Two

On May 18, 2018, while the *Petition* was fully submitted to the District Court, Petitioner's counsel Wiseman received an email from Lori Hughes, Senior Trial Division Chief, employed by the District Attorney of the 34th Judicial District – the office that prosecuted Petitioner in El Paso County, Texas. Attached to the email was a brief letter from ADA Hughes and a "Witness Statement." The letter described the Witness Statement as "a statement from Grace [last name redacted by counsel], regarding her suspicion that her former husband had information relating to the death of Alejandra Flores." App. 62-63.

The Statement was provided to the police on April 23, 2018. Its central revelation was that the witness' former husband, a member of the Los Aztecas gang, was **involved** in the murder of the victim in Petitioner's case. App. 64-65. Thus, the statement provides crucial corroboration of Petitioner's statement given to the police at the time of his arrest and supports a guilt-phase defense of duress, *see* Tex. Penal Code § 18.05(a), and a penalty-phase mitigating fact that Petitioner did not act alone and may well have been coerced.

Because the habeas petition was then fully submitted in the District Court and a decision could be issued at any time, counsel filed a motion requesting a 90-day stay of the proceedings to allow counsel an opportunity to investigate this new it on

revelation. ROA.756. The State opposed the request and the District Court denied it on June 11, 2018. ROA.768; 782.

Petitioner's counsel subsequently filed a motion requesting permission to file a funding motion *ex parte* and under seal. The Court granted permission to file *ex parte* and under seal, over the State's objection. ROA.814. The *ex parte* and sealed motion sought funds to investigate the Witness Statement. This filing made the point that even in the absence of a stay, this information should be investigated. The Court denied that request in a sealed order.

When the case proceeded to the Court of Appeals, Petitioner filed a motion in that Court requesting that a briefing schedule be established related to the denial of funding. See *Petitioner-Appellant's Motion to Establish a Briefing Schedule*, filed September 24, 2019. The motion was denied the day it was filed.

As a precautionary measure, counsel also included a request for a COA on the funding question. The Court of Appeals affirmed the denial of the funding request.

B. Question Three

Petitioner's second penalty phase trial counsel proffered the testimony of an expert in Texas sentencing. They did so, knowing that the trial court would instruct the jury that, in the event the jury returned a verdict of life imprisonment, Petitioner

would be parole eligible in forty-years.[2] The expert would have testified that in fact, based on Petitioner's criminal history, he would not be eligible for parole on a life-sentence for forty-seven and one-half years.[3]

This difference between the instruction given and the expert proffer was material. Petitioner's date of birth is November 22, 1969, and he was therefore just shy of his 35th birthday when the jury considered his sentence during the penalty phase retrial in the fall of 2003. Thus, the difference between telling the jury that he would

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[2] The instruction that caused this concern and that was given to Petitioner's jury stated:

> Under the law applicable in this case if the defendant is sentenced to imprisonment in the Institutional Division of the Texas Department of Criminal Justice for life, the defendant will become eligible for release on parole but not until the actual timed served by the defendant equals 40 years without consideration of any good-conduct time. It cannot accurately be predicted how the parole laws might be applied to this defendant if the defendant is sentenced to a term of imprisonment for life because the application of those laws will depend on decisions made by prison and parole authorities. But eligibility for parole does not guarantee that parole will be granted.

Vol 72, 44.

[3] Petitioner's 20-year sentence for indecency with a child and 10-year felony driving while intoxicated sentence would run consecutively with his possible 40-year life sentence. Petitioner would not be eligible for parole on the 20-year sentence until after five years, and he would not be parole eligible on the 10-year sentence until after two and a half years. Thus, telling the jury that Petitioner would be parole eligible in forty years was false. In reality, and as a matter of state law, Petitioner would have not been parole eligible for 47.5 years at the earliest.

be parole eligible in 40 years (at age 74), or eligible for parole in 47.5 years (at age 82), was significant. Put in other terms, 47.5 years is almost 19% more time of incarceration before parole eligibility than 40 years (7.5 / 40 = 18.75%).

At the hearing on the proposed expert testimony of William Habern, it was shown that he had a forty-year career of working with sentencing, parole, probation and post-conviction legal issues, all in the State of Texas. App. 82. He reviewed Petitioner's criminal history and was familiar with the charges in the instant case. App. 83-84. Thus, he understood that at the time of the penalty hearing, Petitioner had:

> committed the offense of indecency with a child in which he pleaded guilty on a deferred adjudication probation in 1992. And he began probation in 1994. Thereafter his probation was revoked, along with revoking of probation in a felony DWI case. The Court that sentenced him stacked the ten-year DWI sentence on the 20-year sentence for indecency with a child.

App. 83. He opined that, based on this history, there was nothing requiring that Petitioner be released on those two sentences before he served the entire 20 years. App. 83-84. Habern was then asked to assume that Petitioner would be sentenced to a term of life imprisonment resulting from his "capital murder life" conviction, and that sentence was "stacked" *i.e.* ordered to run consecutively to his prior sentences. Again, he opined that there was no legal requirement that Petitioner be released "before that sentence*[i.e.,* the life sentence] ceased to operate." App. 83-85. Having

established that there was no requirement that Petitioner be released on the life sentence that would be "stacked" on the two prior sentences, before the completion of each sentence, Habern was asked to opine on the likelihood that Petitioner would ever receive parole from the three sentences, including his sentence of life imprisonment. He responded that "unless there was some drastic changes in the way the system works ... there is next to no chance he would be paroled." App. 91.

Habern acknowledged that Petitioner would be parole eligible on the life sentence after 40 years. App. 95. However, when combined with the minimum time he would have to do on the other sentences, Petitioner would not be parole eligible for 47.5 years, App.. 107-108. More significantly, Habern further opined that Petitioner would likely not be parole eligible until he served 70 years, and even then, he did not believe that Petitioner would ever be paroled. App. 103-104.

Following the hearing, the trial court heard argument. The State did not contest the expert's qualifications or the validity of his conclusions. Instead, it tendered state cases that it argued precluded the testimony about parole eligibility and the likelihood of parole, may not be considered by a jury because such testimony and opinions are "highly speculative." App. 109.

The defense pointed out that the then-current version of Article 37.071 of the Texas Code of Criminal Procedure permitted the jury to learn that the minimum sentence on a life imprisonment case is 40 years. The defense argued, therefore,

that in this "capital murder case plus" the jury should be provided with information related to the actual minimum parole eligibility (*i.e.*, 47.5 year minimum). App.110-112.

The trial court sustained the State's objection stating only, "The Court is going to follow the law as it stands today." *Id.,* 36.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS DEPARTED FROM THE ACCEPTED AND USUAL COURT OF JUDICIAL PROCEEDINGS WHEN IT ARBITRARILY DENIED PETITIONER THE OPPORTUNITY TO FULLY BRIEF HIS APPEAL OF THE DENIAL OF FUNDING

Like the petitioner in *Ayestas v. Davis*, 138 S. Ct. 1080 (2018), Mr. Renteria sought and was denied funding to investigate under 18 U.S.C. § 3599(f). Petitioner sought funding to investigate potential claims under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, the funds were required to locate and interview a witness who told law enforcement that her ex-husband, an associate of the Los Aztecas drug gang, made statements indicating he had intimate knowledge of the crime for which Petitioner was convicted and sentenced to death. That information corroborates Petitioner's initial statement to police in which he said he participated in the abduction and concealment of the body under threat from the Aztecas. If true, Petitioner would have an affirmative

defense to liability under Texas law, Texas Penal Code § 18.05(a), and, failing that, powerful mitigation evidence against imposition of a death sentence.

The district court denied the request on the basis of a standard the Fifth Circuit correctly held erroneous under *Ayestas*. App. 6. Before the Court of Appeals reached its decision, though, Petitioner moved for leave to brief the issue. Consistent with this Court's decision in *Harbison v. Bell*, 556 U.S. 180, 183 (2009), the Fifth Circuit has long held that 28 U.S.C. § 2253 does not require a habeas petitioner to obtain a certificate of appealability (COA) in order to appeal the denial of funds under § 3599(f).[4] *Smith v. Dretke*, 422 F.3d 269, 288 (5th Cir. 2005).

The Fifth Circuit's denial of Petitioner's motion for a briefing schedule "so far departed from the accepted and usual course of judicial proceedings … as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a). In the usual course of federal appeals, in the Fifth Circuit and elsewhere, when a party adversely affected by a district court order timely files notice that she is taking "[a]n appeal permitted by law as of right," Fed. R. App. P. 3(a), the "appellant *must* serve and file a brief within 40 days after the record is filed." Fed. R. App. P. 31(a)(1) (emphasis

[44] In *Ayestas*, this Court assumed, without deciding, that a Court of Appeals "could not entertain [a] petitioner's § 3599 claim without the issuance of a COA." 138 S. Ct. at 1088 n.1.

added). That "principal brief may not exceed 30 pages," "13,000 words," or "1,300 lines of text." Fed. R. App. P. 32(a)(7)(A)-(B).

After Petitioner's counsel timely filed their appearances in the Fifth Circuit, they, like all others who are similarly situated, received a letter from the court stating, "Before this appeal can proceed you must apply for a certificate of appealability (COA) to comply with 28 U.S.C. § 2253." App. 72 (Ltr. From Monica Washington to Kate Pumarejo and Michael Wiseman dated May 17, 2019). Petitioner timely filed a motion for a COA and supporting brief. On the same day, Petitioner moved the Fifth Circuit for leave to file a principal brief in support of his § 3599 appeal. A little over two hours later, the Court of Appeals summarily denied the motion. That decision represents an arbitrary departure from the usual course of legal proceedings in at least three ways: (1) it was inconsistent with precedent from this Court and the Fifth Circuit, and with the Fifth Circuit's decision in this very case; (2) it exceeded the Circuit's authority under the Federal Rules of Appellate Procedure; (3) it arbitrarily treated Petitioner differently than other similarly situated appellants.

Read literally, as Petitioner's counsel and many others have read the Fifth Circuit's standard letter, it is almost consistent with the text of the Antiterrorism and Effective Death Penalty Act (AEDPA). Section 2253 of Title 28 provides, "Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals." One could read "an appeal may not be taken" to mean

no appeal may be taken unless a COA issues. But the Fifth Circuit's letter does not forestall an appeal of a non-COA issue until a COA *issues* only until a motion is filed; it fails to account for non-COA issues at all.

The unexplained procedure also is inconsistent with cases from both this Court and the Fifth Circuit that rejected the "an-means-any" reading of § 2253. In *Hohn v. United States*, 524 U.S. 236 (1998), this Court expressly rejected the argument "that a request to proceed before a court of appeals should be regarded as a threshold inquiry separate from the merits which, if denied, prevents the case from ever being in the court of appeals." 524 U.S. at 246. The Court found cases like *Ex parte Quirin*, 317 U.S. 1 (1917), and *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), "foreclosed this argument." *Hohn*, *op. cit*. In this very case, the Fifth Circuit implicitly rejected the an-means-any reading of § 2253 when it simultaneously denied a COA and affirmed the denial of funding. Thus, the Fifth Circuit's denial of Petitioner's motion for leave to file a principal brief on his § 3599 appeal was arbitrary and departed from the usual course of proceedings insofar as it was inconsistent with both the Fifth Circuit's and this Court's longstanding cases holding § 2253 does not forestall an appeal of issues for which no COA is required.

Rule 22(b)(2) of the Rules of Appellate Procedure gives each Court of Appeals the authority to prescribe how a habeas petitioner may request a certificate of appealability. Pursuant to that authority, the Fifth Circuit's letter directs counsel to

file a separate motion and brief that "together may not exceed the length limitations set forth in FED. R. APP. P. 32(a)(7)," and that must be filed "within 40 days from the date of this letter." App. 72 (letter). The due date for the COA motion and brief distinguishes the court's directives on seeking a COA from the rule requiring that a principal brief be filed "within 40 days after the record is filed."[5] Fed. R. App. P. 31(a)(1). But, nothing in the Rules suggests the Circuits may treat differently appeals by habeas petitioners that do not require a certificate.

The Fifth Circuit's letter creates confusion that leads to disparate treatment for habeas petitioners and their counsel in cases that do not require a COA. Appeals involving non-COA issues such as the appointment or substitution of counsel,[6] funding of counsel or investigative services,[7] the denial of stay/abeyance under *Rhines v.*

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[5] This means COA motions, and any non-COA issue the Fifth Circuit forces the petitioner/appellant to brief with his COA request, are often prepared and filed without citations to the electronic record on appeal because, at that time, there isn't one.

[6] *See*, *e.g.*, *Holiday v. Stephens*, 577 U.S. 999 (2015) (statement of Sotomayor, J. respecting denial of cert.); *McFarland v. Scott*, 512 U.S. 849 (1994); *Panetti v. Davis*, 863 F.3d 366, 374-375 (5th Cir. 2017); *Battaglia v. Stephens*, 824 F.3d 470 (5th Cir. 2016); *Mendoza v. Stephens*, 783 F.3d 203 (5th Cir. 2015) (mem.); *Rosales v. Quarterman*, 565 F.3d 308 (5th Cir. 2009); *Howard v. Dretke*, 157 Fed. App'x 667 (5th Cir. 2005); *In re Hearn*, 389 F.3d 122 (5th Cir. 2004); *Clark v. Johnson*, 278 F.3d 459 (5th Cir. 2002), overruled by *Harbison v. Bell*, 556 U.S. 180 (2009); *Cantu-Tzin v. Johnson*, 162 F.3d 295 (5th Cir. 1998).

[7] *See*, *e.g.*, *Nelson v. Davis*, 952 F.3d 651 (5th Cir. 2020); *Crutsinger v. Davis*, 929 F.3d 259 (5th Cir. 2019); *Wilkins v. Davis*, 832 F.3d 547 (5th Cir. 2016); *Brown v. Stephens*, 762 F.3d 454 (5th Cir. 2014); *Woodward v. Epps*, 580 F.3d 318 (5th Cir.

Weber, 544 U.S. 269 (2005),[8] or the denial of an evidentiary hearing,[9] are not uncommon in the Fifth Circuit. These similarly situated petitioner/appellants do not receive similar treatment regarding their ability to brief those issues, however.

Compare Petitioner's case with *Ayestas*, and see that whether, and to what extent, a capital habeas petitioner is permitted a principal brief on an appeal as of right, is arbitrarily determined. *Cf. Duncan v. State*, 152 U.S. 377, 382 (1984) ("due process of law and the equal protection of the laws are secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government"). Petitioner's case reached the Court of Appeals in the same posture as *Ayestas*: the district court in each case had denied funding and denied a COA. In each case, the Fifth Circuit sent counsel a form letter stating that "[b]efore this appeal can proceed you must apply for a certificate of appealability." Then their paths diverged.

2009);*Wood v. Quarterman*, 316 Fed.Appx. 359 (5th Cir. 2009); *Smith v. Dretke*, 422 F.3d 269 (5th Cir. 2005).

[8] *Nelson v. Davis*, 952 F.3d 651, 658 (5th Cir. 2020) (citing *Williams v. Thaler*, 602 F.3d 291, 309 (5th Cir. 2010), for the proposition "COA not required to appeal denial of a motion for stay and abatement"); *but see Williams*, 602 F.3d at 309 ("Because … reasonable jurists would not debate that the district court did not abuse its discretion when it denied Williams's request for a stay and abeyance, … we therefore decline to issue a COA on this issue.").

[9] *Norman v. Stephens*, 817 F.3d 226, 234 (5th Cir. 2016).

Mr. Ayestas mentioned the denial of funding only in the procedural history section of his motion for a COA. *Ayestas v. Davis*, No. 15-70015, Mot. COA at 14-15. Petitioner argued that under this Court's decision in *Harbison v. Bell*, 556 U.S. 180, 183 (2009), the COA requirement in § 2253(c)(1)(A) "governs final orders that dispose of the merits of a habeas corpus proceeding," and not orders that deny motions related to counsel under § 3599. App. 50. (*Renteria* Mot. COA at 34 & n.15.). But Petitioner, "in an abundance of caution, ... move[d] for a COA" on the District Court's ruling. App. 50 (COA App. 34).

Mr. Ayestas also argued that under *Harbison* a "COA is not necessary to appeal the denial of funds for expert assistance." *Smith v. Dretke*, 422 F.3d 269, 288 (5th Cir. 2005). But Ayestas made that argument in a separate motion he filed days after his COA application. *Ayestas*, No. 15-70015, Mot. filed Jul. 28, 2015. That motion sought leave to file a separate principal brief arguing the merits of the funding issue which the Fifth Circuit had refused to file. Eventually, the Fifth Circuit granted Mr. Ayestas's motion. *Id*., Order file Aug. 4, 2015. Thus, in the Fifth Circuit, notwithstanding Fed. R. App. P. 31(a)(1), a capital habeas petitioner must file a motion for leave to file a principal brief on the merits of an issue for which no COA is required.

Petitioner also moved for leave to file a principal brief in his appeal of the § 3599 denial. App. 55-61. Unlike the petitioner in *Ayestas*, Mr. Renteria, fearing he

would have no other opportunity to present his position, summarized the argument he wanted to develop in his motion. App. 59-60.

There are still more variations in how the Fifth Circuit addresses the issue. Whether a capital habeas appellant is able to file any principal brief can depend on the quiescence of his counsel. If counsel infers from the Fifth Circuit's letter that no additional briefing is contemplated beyond what accompanies the COA motion, she might fit into that brief everything she can regarding her non-COA issue, as Mr. Renteria did. If appointed counsel is concerned about how the court or its staff might react to a motion for additional briefing, she might do nothing more.

If counsel says nothing about the non-COA issue in the COA brief, then moves for leave to file a principal brief on the non-COA issue, and doesn't include the brief with her motion, she may get an order "denying" the motion, and directing her to file a letter-brief addressing the non-COA issue. *E.g.*, *Halprin v. Davis*, No. 17-70026, Order filed May 15, 2018. In such a case, the Fifth Circuit may deny the appellant the brief permitted by Fed. R. App. P. 32, and only "permit[the appellant] to file a supplemental letter brief of no more than five pages addressing this issue within twenty days of this order." *Ibid*.

On those rare occasions when the Fifth Circuit grants a COA in a capital case, if the petitioner/appellant included his non-COA issue in his COA briefing, the court

will issue a briefing schedule that gives counsel the opportunity to brief all the issues together. *See Mamou v. Davis*, No. 17-70001, Order filed Sep. 14, 2017.

As Justice Frankfurter explained, the qualities of what goes into an appellate court's work has a bearing on the quality of its decisions:

> "Without adequate study there cannot be adequate reflection; without adequate reflection there cannot be adequate discussion; without adequate discussion there cannot be that fruitful interchange of minds which is indispensable to thoughtful, unhurried decision and its formulation in learned and impressive opinions." *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 458-459 (1959) ([Frankfurter, J.] dissenting opinion).

Salve Regina College v. Russell, 499 U.S. 225, 232 (1991). To that end, when this Court has discussed the role of appellate briefs, it has "expected that the parties' briefs will be refined to bring to bear on the legal issues *more* information and *more* comprehensive analysis than was provided for the district judge." *Ibid*. (emphasis added). The Fifth Circuit's process runs counter to that expectation.

As this Court has repeatedly held in cases arising from the Fifth Circuit, the standard for issuance of a COA is distinct from the standard for review on the merits. *See Miller-El v. Cockrell*, 537 U.S. 322, 326-327, 348 (2003) (COA inquiry should ask only if the District Court's decision was debatable); *Tennard v. Dretke*, 542 U.S. 274, 283 (2004); *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (COA determination is a "threshold" inquiry and "is not coextensive with a merits analysis"). The COA bar is a low one: "[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." *Buck*, 137 S. Ct. at 774 (alteration in original) (quoting *Miller-El*, 537 U.S. at 338) (internal quotation marks omitted). Correlatively, a would-be appellant seeking to satisfy that threshold inquiry will not submit a brief that is coextensive with a merits analysis. But, capital habeas cases are often complex and involve both the issues of constitutional criminal procedure involved in claims, and the issues of habeas law, such as the relitigation bar or 28 U.S.C. § 2254(d), or procedural default, that control whether or to what extent the federal court will review them. Those issues are subsumed within the COA briefing. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Consistent with the denial of ordinary briefing in appeals of right, in capital habeas cases, the Fifth Circuit sometimes imposes a penalty for briefing an issue too much at the COA stage. If a COA applicant extensively briefs his issue, and is granted COA, the Fifth Circuit may limit the appellant's briefing. In several cases in which a habeas petitioner was awarded a COA, the Court of Appeals perversely limited merits briefing either by ordering or advising counsel to limit briefing on the actual appeal, because of the lengthy COA briefing, suggesting the appellate briefing was "supplemental," limiting briefing to evidence and authorities not cited in the COA briefs, shortening the time for briefing, setting severe time and page limits on

the briefs.[10] In the past, the court's advice has led some counsel to forego filing an appellate brief at all.[11]

"Th[is] Court's interest in ensuring compliance with proper rules of judicial administration is particularly acute when those rules relate to the integrity of judicial processes." *Hollingsworth v. Perry*, 558 U.S. 183, 196 (2010). The Fifth Circuit's arbitrary and disparate denial of full briefing rights under the Rules of Appellate Procedure when the appellant is a capital habeas petitioner certainly calls into question that court's administration of the rules.

II. THE FIFTH CIRCUIT'S CURTAILED PROCESS PRODUCED AN ERRONEOUS RULING

The Fifth Circuit's decision to preclude appellate briefing also had a very real and prejudicial effect here. Although the Fifth Circuit correctly held that the district court applied an incorrect standard, App. 6, instead of remanding the case to the

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[10] *See Dennes v. Davis*, No. 17-70010, 2019 WL 2305030 (5th Cir. May 29, 2019) (un-published) ("The court notes that extensive briefing about these issues has already been provided. Therefore, any further briefing must be limited to supplemental evidence and authorities. The parties' supplemental briefs are limited to 20 pages each. Further, petitioner must furnish this briefing within thirty days hereof, and the state must respond within twenty-one days.").

[11] *Gates v. Davis*, 660 F. App'x 270, 271 (5th Cir. 2016) ("We authorized Gates to file a sup-plemental brief addressing the merits of this claim, to the extent not already addressed in the COA briefing, but he declined.").

district court, the Fifth Circuit affirmed the denial of funding based on a factual finding—itself based on an untoward inference—that any potential claims that could arise from the investigation would lack merit. Specifically, the court explained that because the witness's statement was provided to police in 2018, years after Mr. Renteria's trial concluded, nothing contained within the statement would have been available at the time of trial to serve as the basis of a *Brady*, ineffective-assistance, or innocence claim.

The court's decision denying Mr. Renteria's funding request does not even mention this Court's conclusion that § 3599(f) "calls for … a determination by the district court, in the exercise of its discretion, as to whether a reasonable attorney would regard the services as sufficiently important." *Ayestas*, 138 S. Ct. at 1093. This Court identified "the potential merit of the claims that the applicant wants to pursue," *id*. at 1094, as one of the "considerations" that should "guide[]" the discretion of the district court when determining whether a reasonable attorney would regard the investigation as sufficiently important. *Id*. at 1093. The Court of Appeals decontextualized the role of "potential merit" in two outcome-determinative ways.

First, the court converted that guide to discretion when applying the "reasonable attorney" standard into a necessary criterion the petitioner must satisfy in order to show the services are "reasonably necessary." App. 6 ("Whether the service is reasonably necessary depends, in part, upon 'the potential merit of the claims that

the applicant wants to pursue.'"). By decontextualizing the role of "potential merit" in the analysis, the Fifth Circuit shifted the focus from what a reasonable attorney would think is sufficiently important to whether the Court of Appeals thinks the investigation is reasonably necessary. This Court's reasonable attorney standard is left with no role in the Fifth Circuit's analysis.

The court then compounded that error by ignoring another qualification from *Ayestas*. This Court clarified that "a funding applicant must not be expected to prove that he will be able to win relief if given the services he seeks." 138 S. Ct. at 1094. Consistent with that idea, this Court quoted with approval Mr. Ayestas's concession that a petitioner has to demonstrate "that the underlying claim is at least 'plausible.'" *Ibid*. This Court's finding that those "interpretive principles are consistent with the ways in which § 3599's predecessors were read by the lower courts," and that "abundance of precedent shows courts have plenty of experience making the determinations that § 3599(f) contemplates," *ibid*., indicates that a claim has enough "potential merit" if it is plausible that reasonable attorneys could develop it. The Fifth Circuit's analysis is far more demanding.

By doubly decontextualizing "potential merit," the Court of Appeals freed itself to assess whether Mr. Renteria proved the exculpatory information was available at the time of his trial or resentencing, rather than assess whether a reasonable attorney would think the investigation is sufficiently important because it is plausible

that the information was available. (The lower court appeared to assume, rightly, that if the information the witness described was available to either law enforcement or defense counsel at either of the relevant times, that would have supported potentially meritorious claims.) By consigning discussion of the possibility that the information was available to a footnote, App. 7, the Fifth Circuit provided a visual metaphor for how it regarded the analysis required by *Ayestas*, as something of marginal importance.

The court subverted the purpose of § 3599(f)—to enable reasonable attorney investigations into potentially important facts—by basing its conclusion on speculation, not fact. The Fifth Circuit also erred by treating its erroneously focused assessment of "potential merit" as outcome determinative rather than a consideration alongside the "assessment of the likely utility of the services requested" that the statute "requires." *Ayestas*, 138 S. Ct. at 1094. At the time the court rendered its decision, because there was no funding, neither the court nor defense counsel had had an opportunity to interview the witness. Mr. Renteria asserted that the witness statement was equivocal as to whether the witness had provided relevant information to detectives prior to his trial. And the Court acknowledged that when the witness spoke of her prior interaction with detectives, she "did not indicate when the statement was given, who it was given to, or describe the substance of the statement." App. 7. Yet the court conclusively found that it was evident from the witness statement that the

information therein provided had not been conveyed to the police prior to Mr. Renteria's trial, thus rendering any potential *Brady* or ineffective assistance of trial counsel claims meritless. App. 6.

The Fifth Circuit's narrow focus and circular reasoning would effectively lead to the denial of funding requests in nearly all circumstances: by their logic, funding would only be reasonably necessary in situations where the facts for which the petitioner seeks funding to investigate are already known, thus rendering investigation unnecessary. Ultimately, by denying defense counsel the opportunity to brief the issue, the Fifth Circuit created a situation in which their consideration of the merits of any potential claims did not – because it could not – comport with the *Ayestas* standard.

This Court should grant the writ, vacate the Fifth Circuit's decision, and remand with instructions to assess whether investigative services are likely to be useful in determining whether the witness's information was available prior to Mr. Renteria's trial or resentencing.

III. THE COURT SHOULD REVIEW WHETHER IT IS DEBATABLE THAT THE STATE COURT VIOLATED PETITIONER'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS WHEN IT FALSELY INSTRUCTED THE JURY THAT PETITIONER WOULD NOT BE PAROLE-ELIGIBLE ON A LIFE SENTENCE FOR FORTY YEARS

This is a claim about truth in sentencing, and, in particular, about the Due Process Clause-based right of a capital defendant to provide the sentencer with accurate information. Where future dangerousness was at issue in this Texas capital proceeding, the jury was given a jury instruction stating that in the event the jury returned a sentence of life imprisonment, Petitioner would be parole eligible at forty years. *This instruction was false.*

In anticipation of the false instruction, Petitioner's counsel proffered the opinion of an expert in Texas sentencing. His opinion was that based on Petitioner's criminal record, he would not be parole eligible until he served at least forty-seven and one-half years. The trial court, relying on Texas law that ostensibly precluded such testimony as speculative, precluded Petitioner from presenting this accurate information to the jury.

The Fifth Circuit, acknowledged that under this Court's precedent a sentencer's consideration of false information that is material to the sentencing decision "renders the entire sentencing procedure invalid as a violation of due process." *Townsend v. Burke*, 334 U.S. 736, 740-41 (1948); *Roberts v. United States*, 445 U.S. 552, 556 (1980) (recognizing that due process precludes sentences imposed on the

basis of 'misinformation of constitutional magnitude (internal quotation marks omitted)); *United States v. Tucker*, 404 U.S. 443, 447 (1972) (finding a due process violation when "a sentence [was] founded at least in part upon misinformation of constitutional magnitude"). App. 5. The same is true when a capital defendant is not permitted to deny or explain a material sentencing fact. *Gardner v. Florida*, 430 U.S. 349, 362 (1977) (the Due Process Clause of the Fourteenth Amendment has long prohibited the execution of a person "on the basis of information which he had no opportunity to deny or explain."); *Skipper v. South Carolina*, 476 U.S. 1 (1986); *Simmons v. South Carolina*, 512 U.S. 154, 161 (1994).

Here, the jury was misinformed that Petitioner would be parole eligible after forty years on a life sentence, when the objective fact was that he would not be parole eligible for forty-seven and one-half years. Petitioner was not permitted by the trial court to explain what was wrong about the information contained in the jury instruction: that in the event that the life sentence was "stacked" on the prior convictions, Petitioner would not be parole eligible until forty-seven and one-half years.

The Fifth Circuit recognized the distinction between cases in which the question of when a defendant will be paroled—which is clearly a subjective and arguably speculative question—from a sentence calculation which would alert the sentencer to when a defendant would be a parole-*eligible*. *Id.* However, the court found that

because the sentencing judge had discretion to run a life sentence concurrent or consecutive to Petitioner's other sentences, Petitioner's parole eligibility was "pure speculation." *Id.* This conclusion, which tracked the district court's opinion, was more than just debatable. It was wrong violated Petitioner's right to due process of law.

There was nothing speculative about the binary possibilities for Petitioner's sentence: *if* the trial court sentenced Petitioner consecutively, he would not be parole eligible for forty-seven and one-half years; *if* the court sentenced him concurrently, he would be parole eligible in forty-years. Instead, the jury was told that he would be parole eligible in forty years, which was equally "speculative" to the other possibility.

The Fifth Circuit's plain error warrants review by this Court. This Court should vacate the decision of the Court of Appeals and remand with instructions to issue a COA and entertain an ordinary appeal on Petitioner's truth-in-sentencing claim.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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Respectfully submitted,

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