No. _____

In The
Supreme Court of the United States

JESUS RIVERA,

Petitioner,

v.

BRIAN COLLIER, 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

What test should the Courts of Appeals employ to determine whether a state court writ of habeas corpus was decided in an objectively unreasonable manner under this Court's precedent?

PARTIES TO THE PROCEEDINGS

The parties to the proceeding in the court whose judge is sought to be reviewed:

Appellees:	**Counsel for Appellees**:
Brian Collier, Director, of the Texas Department of Criminal Justice Correctional Institutions Division	Sarah Miranda Harp of the Attorney General of Texas, Austin, Texas
Appellant:	**Counsel for Appellant**:
Jesus Rivera	Cynthia Hujar Orr

LIST OF PROCEEDINGS

- *Jesus Rivera, Petitioner–Appellant v. Bobby Lumpkin, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent–Appellee*, No. 21-50441, before the United States Court of Appeals for the Fifth Circuit.
- Motion for Certificate of Appealability denied March 3, 2022. Appendix 1-2
- *Jesus Rivera, Petitioner v. Bobby Lumpkin, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent*, Civil No. SA-19-CA-01435-DAE.
- Order of dismissal entered on April 21, 2021. Appendix 3-19.
- *Ex Parte Rivera*, WR-89, 320-01, before the Texas Court of Criminal Appeals. Denied without written order on October 2, 2019.

LIST OF PROCEEDINGS—Continued

- *Jesus Rivera v. State of Texas*, PD-0537-17 (Tex. Crim. App.—November 22, 2017).
- *Jesus Rivera v. State of Texas*, 13-15-00145-CR (Tex. App.—Corpus Christi/Edinburg Dec. 1, 2016, pet. ref'd) on appeal before the Thirteenth Court of Appeals Corpus Christi/Edinburg transferred from the Fourth Court of Appeals, 04-15-00131-CR, San Antonio, Texas.
- Affirming conviction on December 1, 2016. Motion for Rehearing denied April 25, 2017.
- *State of Texas v. Jesus Rivera*, Cause No. 2013CR1573, before the 144th District Court, Bexar County, San Antonio, Texas.
- Convicted and sentenced on February 24, 2015.

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PETITION FOR WRIT OF CERTIORARI

Jesus Rivera, ("Rivera"), a person serving a sixty-six year sentence in a Texas prison, respectfully petitions this Court for a Writ of Certiorari to review the judgment of the Fifth Circuit Court of Appeals denying him a certificate of appealability.

OPINIONS BELOW

The Order by the Fifth Circuit Court of Appeals denying Mr. Rivera's Motion for Certificate of Appealability was issued on March 2, 2022. That order is attached as Appendix ("App.") at 1–2. Mr. Rivera's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 was denied with prejudice by the United States District Court for the Western District of Texas, San Antonio Division on April 21, 2021. App. 3–19.

JURISDICTION

Mr. Rivera invokes this Court's jurisdiction under 28 U.S.C. § 1254(1) having timely filed this Petition for Writ of Certiorari within 90 days of the Fifth Circuit Court's denial of his motion for a certificate of appealability for his writ of habeas corpus, pursuant to the Fifth Circuit Court's Order dated March 3, 2022.

STATUTES INVOLVED

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)

(1) 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 unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)

(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State,

through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(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; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)

(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing

facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substance Acts [21 USCS § 848], in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254 [28 USCS § 2254].

28 U.S.C. § 2254.

STATEMENT OF THE CASE

In February 2015, a Bexar County, Texas jury found Petitioner guilty of the murder of Ryan Yearley and sentenced him to sixty-six years of imprisonment. *State v. Rivera*, No. 2013-CR-1573 (144th Dist. Ct. Feb.

24, 2015). The Court transferred the case to the Thirteenth Court of Appeals. The Thirteenth Court of Appeals affirmed on December 1, 2016. *Rivera v. State*, 2016 WL 7011588 (Tex. App.—Corpus Christi—Edinburg, Dec. 1, 2016, pet. ref'd). He then filed a petition for discretionary review in the Texas Court of Criminal Appeals, which was refused. *Rivera v. State*, No. 0537-17 (Tex. Crim. App. Nov. 22, 2017). Petitioner filed a timely state habeas corpus application and an amended application challenging the constitutionality of his conviction, which the Court of Criminal Appeals denied without a written order and relying on the trial court's findings. *Ex parte Rivera*, No. 89,320-01 (Tex. Crim. App. 2019). Petitioner filed a federal writ of habeas corpus under 28 U.S.C. § 2254 on December 10, 2019, which was denied with prejudice and regarding which a certificate of appealability was denied. *Rivera v. Lumpkin*, No. 21-50441 (5th Cir. March 3, 2022).Rivera's Petition before the District Court raised four (4) grounds for relief:

(1) actual innocence based the testimony of his sister who heard the offense; (2) that trial counsel for Rivera was ineffective as for failing to investigate an expert concerning synthetic marijuana and its effects making its user violent; (3) that his appellate lawyer was ineffective for failing to order a complete record of the case (a portion which established State misconduct and intimidation of Rivera's witnesses); and (4) that the State Court failed to afford him a hearing on his writ or adequate review of his claims. Rivera had brought the federal claims in his state writ as well. The

Respondent filed an answer claiming that Rivera did not show that the Bexar County Court (upon which recommendation the Court of Criminal Appeals relied) made an unreasonable application of Supreme Court precedent. The federal district court rejected his free-standing innocence claim as not cognizable on a federal writ. And the District Court denied Rivera's ineffective assistance of trial and appellate counsel finding that reasonable jurists would disagree that he was entitled to relief. App. 8. Most Circuit Courts of Appeals use some form of the fairminded jurists could disagree standard.

REASONS FOR GRANTING THE WRIT

In *Williams v. Taylor*, 529 U.S. 362, 409, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), this Court addressed the standard to be applied when determining whether a state court decision is an objectively unreasonable application of Supreme Court precedent. Justice O'Connor joined the opinion granting relief for ineffective assistance of counsel, but in a concurrence expressly rejected a "reasonable jurists" standard, finding that such a test is "of little assistance to the courts that must apply section 2254(d)(1) and, in fact, may be misleading." *Williams v. Taylor*, 529 U.S. 362, 409, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). In *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) this Court refined that test to exclude use of the reasonable jurists language to analyze whether a state court decision is an unreasonable application of

Supreme Court law quoting *Yarborough v. Alvarado*, 541 U.S. 652, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004). When discussing whether the State court decision under consideration is an unreasonable application of clearly established federal law, the Court stated in *Woods v. Etherton*, 578 U.S. 113, 136 S.Ct. 1149, 194 L.Ed.2d 333 (2016) that a petitioner has failed to prove "that the state court's ruling on the claim being presented in federal court [is] so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." The term "fairminded" suggests a subjective standard of review. In *Woods v. Etherton*, 578 U.S. 113, 136 S.Ct. 1149, 194 L.Ed.2d 333 (2016), this Court used the fairminded disagreement test and used the term fairminded jurists. It further discussed a subjective analysis of how a fairminded jurist might reach the conclusion that the truth of certain facts could be weighed by jurists as to be deemed not disputed so that repetition of those facts would make no difference. But it accomplished this by a subjective weighing of evidence by a fairminded jurist. In *Taylo*r, Justice O'Connor concurring, stated that the "unreasonable application" clause requires that "a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." This suggests that the federal court would consider how the state court reached its decision; unreasonably applying an established legal principle to the facts of the case. This test contains the words in §2254(d)(1)

without adding a subjective component to the test. The jurists evaluating whether habeas relief may be granted are federal judges deciding the issue; not a reasonable jurist or a fairminded one. Using a reasonable jurist or a fiarminded one requires the court to first get into the mind of such a jurist and then decide what such a jurist would determine. These components interject a subjective component to what this Court has held is an objective test.

In the Fifth Circuit Court of Appeals the test employed to determine whether a state court decision is unreasonably wrong is whether fairminded jurists could disagree with how the State court applied Supreme Court law.[1] If such jurists could disagree, then the decision is not unreasonably wrong. *Evans v. Davis*, 875 F.3d 210, 217 (5th Cir. 2017). This standard appears to be a subjective standard, employing a fairminded jurist, even though the opinion does state that the Court is applying an objective test. Further, the Fifth Circuit requires that any error must be well understood and beyond any possibility for fairminded disagreement. Again, fairminded disagreement interjects a subjective component. The standard is strict, requiring not only that fairminded jurists could not disagree about the conclusion reached by the state court, but also that there is not any possibility for fairminded disagreement.

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[1] "Defining an 'unreasonable application' by reference to a 'reasonable jurist,' however, is of little assistance to the courts that must apply §2254(d)(1)."

The First Circuit Court of Appeals in *Hollis v. Magnusson*, 32 F.4th 1, 8 (1st Cir. 2022), would not grant relief if "fairminded jurists *could* disagree on the correctness of the state court's decision." Thus, the test employed is less strict than that used in the Fifth Circuit.

The Second Circuit Court of Appeals requires "an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Here once more the disagreement must be fairminded and not an unreasonable application of established law to the facts of the prisoner's case.

The Third and Seventh Circuit Courts of Appeals would deny relief to a federal writ challenging a state court conviction where there is no possibility or not any possibility that fairminded jurists could disagree that the state court's decision conflicts with a Supreme Court precedent. *Garlick v. Lee*, 1 F.4th 122, 127 (2nd Cir. 2021); *Randolph v. Secretary Pennsylvania Dept. of Corr's*, 5 F.4th 362, 373 (3rd Cir. 2021); *Turner v. Brannon-Dortch*, 21 F.4th 992, 995–96 (7th Cir. 2022).

The Fourth, Eighth, Tenth and Eleventh Circuits are similar and would not grant relief in a federal writ complaining of a state court conviction if fair minded jurists could disagree that the state court decision was correctly rendered. *Witherspoon v. Stonebreaker*, 30 F.n4th 381, 392 (4th Cir. 2022); *Donelson v. Steele*, 16 F.4th 559, 567 (8th Cir. 2021); *Frost v. Pryor*, 749 F.3d 1212, 1223 (10th Cir. 2014); *Holsey v. Warden,*

Georgia Diagnostic Prison, 694 F.3d 1230, 1257 (11th Cir. 2012).

But the Sixth and Ninth Circuit Courts of Appeals use a single jurist test and inquire whether it is beyond the realm of possibility that a fairminded jurist could agree with the state court. *Chinn v. Warden, Chillicothe Correctional Institution*, 24 F.4th 1096, 1101 (6th Cir. 2022); *Deck v. Jenkins*, 814 F.3d 954, 985 (9th Cir. 2016). This Court appears to have also employed the single jurist test in *Shinn v. Martinez Ramirez*, 596 U.S. ___, *9, Cause No. 20-1009 (May 23, 2022)[prisoner must demonstrate that under this Court's precedence no fairminded jurist could have reached the same judgment as the state court].

None of the Courts now include that such jurists need be reasonable ones. This Court should grant certiorari to achieve uniformity in the standard applied to decide an important federal question; whether a writ of habeas corpus complaining of a state court conviction should be granted under an objective or subjective test performed based upon whether the state court's application of clearly established federal law was objectively unreasonable, or upon what a single jurist might agree with, or whether fairminded jurists might or could agree with the state court decision, whether there is no possibility that a fairminded jurist would agree with that decision, or whether some test based upon the statute would lead to more precision and uniformity.

CONCLUSION

For the foregoing reasons, Rivera respectfully requests that this Court issue a writ of certiorari to determine the standard for granting a writ under 28 U.S.C. § 2254(d)(1).

Respectfully submitted,

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