No. 23-

IN THE

SUPREME COURT OF THE UNITED STATES

HEATH R. BARKER,
Petitioner,

v.

BOBBY LUMPKIN,
Director, Texas Department of Criminal Justice, Institutional Division
Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1) Was Petitioner entitled to a certificate of appealability (COA) on his claim that he received ineffective assistance of counsel under the Sixth Amendment when trial counsel failed to obtain and utilize an expert on forensic interviews in a child sexual abuse case?

PARTIES

Petitioner:	Heath Barker
Respondent:	Bobby Lumpkin, Director, Texas Department of Criminal Justice, Correctional Institutions Division

RELATED PROCEEDINGS

Barker v. Lumpkin, No. 4:21-CV-742-P, United States District Court for the Northern District of Texas, Fort Worth Divsion

Barker v. Lumpkin, No. 23-10733, United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Heath R. Barker respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The Fifth Circuit's order denying a certificate of appealability was unpublished, but is provided in the Appendix. *See* Appendix A.

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 December 13, 2022. *See* Appendix A. This petition has been filed in this Court within 90 days of the 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

This petition follows the Fifth Circuit's refusal to afford Petitioner a certificate of appealability (COA) on an issue arising from the denial of his § 2254 federal petition for habeas corpus. In his habeas petition, Petitioner collaterally challenged a conviction and sentence he received in the State of Texas. Petitioner seeks a more thorough and meaningful appellate review of one issue which raised a colorable if not meritorious claim of ineffective assistance of counsel under the Sixth Amendment. Petitioner is currently incarcerated for 40 years imprisonment.

Relevant Facts

The federal district court borrowed the factual summary from the state appellate court on direct appeal, which was as follows:

> The complainant in this case, A.M., is appellant's daughter. Since her birth, A.M. lived with her great-aunt, L.M., but she occasionally spent weekends with her father. After returning home from one of these visits, A.M. was getting into the bathtub when L.M. observed that something was written on A.M.'s backside. On one of A.M.'s buttocks, the words, "I'm going in there," were written, along with an arrow pointing toward the cleft between A.M.'s buttocks. On the other side, the words, "I heart you," were written. L.M. asked who had written on her, and A.M. replied that it was appellant. L.M. took a photograph, which she later provided to the police, of A.M.'s buttocks. L.M. asked A.M. whether appellant had "done anything else like touch her on her privates or anything." A.M. said yes, and told L.M. that appellant had put his hands in her panties and "poked her in the front and the back." L.M. determined to contact the police the next day, and asked no further questions. The following morning, A.M. told L.M. that appellant had been "doing that" since she was seven. A.M. was ten years old at the time.

(ROA. 84) (quoting *Barker v. State*, No. 07-17-00024-CR, 2018 Tex. App. LEXIS 5930, at *1-2 (Tex. App.—Amarillo July 31, 2018, pet. ref'd)).

Forensic Interviewer Vouching for Credibility of Complainant

A.M. had participated in a forensic interview at the Alliance for Children. (ROA. 332.) The State called the forensic interviewer as a witness, Samantha Shircliff. Through Shircliff, the State admitted statements A.M. had made during the forensic interview. A.M. told Shircliff that Petitioner had penetrated both her anus and her vagina with his finger. (ROA. 342-343.) She said the abuse began when she was 7, and every time it happened in the same fashion. (ROA. 345.)

Shircliff highlighted for the jury that A.M. was able to provide so-called "sensory and peripheral details" regarding the alleged incidents. (ROA. 343-344.) She told the jury that "it's hard to make those details up" if you've not actually experienced the abuse event itself. (ROA. 344.) She further testified that she did not have any concerns that A.M. had been coached. (ROA. 345.)

Finally, Shircliff emphasized to the jury that A.M had recounted to her what appeared to be a "script memory." (ROA. 347.) She found notable A.M.'s statements that "it happens to me the same every time," and "he'll always put his hand in my underwear." (ROA. 347.) Shircliff testified she sees script memories "frequently with children who have been chronically sexually abused." (ROA. 347.)

The defense did not cross-examine Shircliff on any of these problematic aspects in her testimony. (ROA.351-353.) Instead defense counsel focused its inquiry on whether A.M. had been "fidgety" during the interview. (ROA. 354.) Based on this line of questioning, the State sought admission of the video interview into evidence. (ROA.

355.) The court admitted the video over a defense objection. (ROA. 355-356.)

Inconsistent Complainant Testimony

A.M.'s testimony during trial differed substantially from her earlier statements. She claimed that he touched her where she "pooped," but denied that he touched any other part. (ROA. 304-307.) She also denied that the finger ever penetrated her anal cavity. (ROA. 307.) She did not know how many times it happened but she claimed she thought it happened more than ten times. (ROA. 305.) A.M. testified she thought the abuse started when she was "like nine or ten," as opposed to seven. (ROA. 308.)

Closing Argument

The State emphasized Shircliff's testimony during closing argument. Citing Shircliff's testimony, the prosecutor argued that statements like "It happened the same way every time" and "It always happened this way, always the same," are script memories and indicative of "chronic" sexual abuse. (ROA. 426.) The prosecutor also argued that the presence of "peripheral and sensory" details "ward[ed] off things like made-up stories and coaching." (ROA. 426.)

State Habeas

Petitioner was represented by Ray Hall and Brandon Weaver in the trial. At the writ hearing, Hall testified that he did not employ an expert in the field of forensic interviews "because I didn't feel like it was necessary. It was pretty straightforward." (ROA. 636.) Hall advised that the defense strategy was "basically we were trying to point out that [A.M.] was lying." (ROA. 658.) and "just wasn't being honest about the

stuff." (ROA. 664.) He further testified that from "what I've learned" about forensic interviews, he believed Shircliff's testimony to the jury was accurate. (ROA. 663.)

Weaver, who conducted the cross examination of the forensic interviewer, couldn't remember whether the forensic interviewer's testimony was accurate. (ROA. 670.) Weaver did agree that he would have cross-examined her on points he believed were factually inaccurate. (ROA. 670.)

At the writ hearing, Petitioner called Dr. Aaron Pierce, an expert on forensic psychology. He testified that "there's no literature to support" the theory that the presence of sensory and peripheral details "increase the probability that something happened." (ROA. 688.) Pierce similarly wrote in his affidavit that "there is absolutely scientific literature that supports that one must experience an event in order to offer descriptive information." (ROA. 943.) He found "completely false" Shircliff's testimony that it is harder to come up with details if a child has not actually experienced an event. (ROA. 943.)

Secondly, Pierce took strong issue with Shircliff's testimony that she had no concerns for coaching. He testified that "there's no way for any expert or forensic interviewer or me or anyone to know if coaching has occurred, so there's no way to say we have no concerns about the potential presence of it." (ROA. 691.)

Finally, Pierce found "most problematic" Shircliff's testimony regarding script memories. (ROA. 695.) The "presence of a particular memory or something," Pierce testified, "whether it's script or episodic, does not tell us that something absolutely has

happened." (ROA. 696.) He also took issue with the statement that "script memories" arise "frequently with children who have been chronically sexually abused." (ROA. 695.) He found this line of testimony "grossly mislead[ing]" and "inconsistent with literature." (ROA. 695-696.) Pierce concluded that "an expert could have corrected [this line of testimony] for the jury to help them better understand." (ROA. 697.)

State Findings

The state trial court perfunctorily adopted the State's proposed findings of fact and conclusions of law. (ROA. 1190.) It found that Petitioner could not establish either deficient performance or prejudice on the forensic-expert claim. (ROA. 1106, 1115, 1190.) With regard to deficient performance, the trial court did not find that defense counsel's failure to consult with or call an expert on forensic interviews had been based on a reasonable trial strategy. See (ROA. 1102-1107, 1114-1116.) Instead it concluded that Petitioner had not proven that the forensic interviewer's testimony had been misleading or false. (ROA. 1114-1115.)

On prejudice, the court found in conclusory fashion that Petitioner could not establish a reasonable probability of a different result had he obtained an expert on forensic interviews. (ROA. 1106-1107, 1116.)

Federal Findings

The district court below denied the petition on the merits in a memorandum opinion. (ROA. 83-95.) It upheld the state habeas ruling on deficient performance because trial counsel had "focused their defense on discrediting A.M.'s outcry," which

they had viewed as more problematic than Shircliff's testimony. (ROA. 94.)

On the prejudice prong, the district court found Petitioner "did not show how Pierce's potential testimony would have changed the outcome of the trial." (ROA. 94.) The court noted that "the jury did not solely hear from Shircliff," but also heard from the "complainant and her aunt." (ROA. 94.)

Denial of COA

The district court concluded its opinion by denying Petitioner a certificate of appelability (COA). (ROA. 95.) The court offered no separate analysis for why a COA should be denied. (ROA. 95.) It merely stated that a COA should be denied "for the reasons discussed" in the foregoing opinion." (ROA. 95.)

Petitioner requested a COA from the Fifth Circuit. The court of appeals denied Petitioner's request for a COA in a brief, perfunctory order. *See* Appendix A at 1-2. It identified the applicable standard which must be met to obtain a COA. *See id.* It then stated tersely that Petitioner "has failed to make the requisite showing," *Id.*

This petition follows.

REASONS FOR GRANTING THE PETITION

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

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 (emphasis added). 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).

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*. The Court has made clear that "[t]he question is the debatability of the underlying constitutional claim, not the resolution of that debate." *Miller-El v. Cockrell*, 537 U.S. 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 (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. at775-780(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) & *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 a 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. 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). *Jimenez*, 555 U.S. 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.* at121. 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 ones which this Court unanimously agrees 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 merits. *See Trevino*, 569 U.S. 413,420 (2013). But perhaps more strikingly, it denied 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.[1]

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; Appendix A. 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 eliminate the Fifth Circuit's stingy reluctance to grant COAs on debatable, and in some a cases even meritorious issues.

II. Petitioner should have received a COA on his claim that trial counsel was ineffective for failing to obtain and utilize a expert on forensic interviews.

In this case, reasonable jurists could debate the district court's conclusion that trial strategy reasonably justified defense counsel's failure to obtain an expert on forensic interviews. (ROA. 94.) The district court found trial counsel had "focused

[1] 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.*

their defense on discrediting A.M.'s outcry" as a matter of strategy. (ROA. 94,) But reasonable jurists could debate whether strategy justified the total failure to counter pseudo-scientific opinion on the very issue of complainant's credibility, the central focus of the defense's cited strategy.

Schircliff's testimony effectively communicated to the jury that scientific observations she made about the child showed that the child had been recounting authentic memories. Her testimony thus bore directly on the core defensive question of whether A.M.'s outcry should be "discredited." Hall advised that the central defense strategy was "basically we were trying to point out that [A.M.] was lying." (ROA. 658.) and "just wasn't being honest about the stuff." (ROA. 664.) Trial counsel failure to do *anything* to counter Shircliff's so-called expert testimony regarding the complainant's credibility would seem to run contrary to their own stated strategy.[2]

An expert such as Dr. Pierce could have demonstrated that Shircliff's testimony was "inconsistent with [scientific] literature" and "grossly mislead[ing]. (ROA. 695-697.) The assistance of an expert would only have furthered the cited defense objective of "discrediting A.M.'s outcry." (ROA. 94.) At this stage, the court need only decide whether the issue is reasonably debatable among jurists of reason. *See Slack*, 529 U.S. at 484. Reasonable jurists could at least debate whether the failure to obtain and use

[2] Of course testimony vouching for the credibility of the complainant is blatantly inadmissible under Texas law. *See, e.g., Yount v. State*, 872 S.W. 2d 706. n. 8 (Tex. Crim. App. 1993); *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).

a forensic-interview expert had been unreasonable "under prevailing professional norms." *Strickland*, 466 U.S. at 688.

2) Prejudice

Reasonable jurists could also debate the district court's conclusion that Petitioner could not meet the prejudice prong of *Strickland*. (ROA. 94.) The trial court reasoned that "the jury also heard from A.M., the complainant, and her aunt, L.M., who discovered written words on A.M.'s buttocks." (ROA. 94.) But this reasoning amounts to importing a legal sufficiency standard into the prejudice analysis. This is patently wrong; the issue is not whether Petitioner still could have been convicted even if Shircliff's testimony had been properly discredited through an expert like Pierce. *See Kyles* 514 U.S. 434 (citing *Strickland* progeny, and noting the reasonable probability standard "*is not a sufficiency of evidence test*") (emphasis added). The question is whether there is at least a reasonable probability that a jury would have reached a different result had the defense obtained and utilized an expert. *See Kyles*, 514 U.S. at 434-435 ("[a] defendant need not demonstrate that after discounting the exculpatory evidence in light of the undisclosed evidence, there would not have been enough to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient basis to convict").

Applying the correct standard, Petitioner plainly can demonstrate at least a reasonable probability of a different result. The trial centered on the credibility of the child complainant. The State's other witnesses served little purpose beyond bolstering

the child's claim of abuse. Trial counsel's failure to obtain an expert on forensic interviewing doomed their ability to discredit supposedly expert testimony that touched squarely on credibility of the child's allegations of abuse. The jury was effectively told that the presence of 1) sensory and peripheral details, 2) script memories, and 3) the absence of signs of coaching provided scientific evidence the child was telling the truth. Trial counsel provided the jury with no reason to disbelieve this testimony, which in turn gave the jury no reason to disbelieve the complainant.

Had the jury been made aware that experts in the field found Shircliff's testimony was false, misleading, and contrary to existing scientific literature, there is a reasonable probability it would have viewed the child's testimony differently. *See Fuller v. State*, 224 S.W. 3d 823 (Tex. App.—Texarkana 2007, no pet.); ("The only real issue in this case was the credibility of the witnesses, in particular the complaining witness, J.W. The State's case-in-chief consisted of the testimony of J.W. and four witnesses, each of whom testified in some manner that J.W. was a truthful and credible witness. Under these circumstances we find, as in *Miller* and *Sessums,* there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different."); *Sessums v. State*, 129 S.W. 3d 242, 248 (Tex. App.—Texarkana 2004, pet. ref'd.); *Miller v. State*, 757 S.W. 2d 880, 884-85 (Tex. App.—Dallas 1988,pet. ref'd.); *Garcia v. State*, 712 S.W. 2d 249 (Tex. App.—El Paso 1986, pet. ref'd.). The jury had ample reason to doubt the child's testimony, doubt which may have been removed with Shircliff's unchallenged "expert" testimony.

Had Shircliff's bolstering testimony been discredited, or at least questioned through the existence of an expert, it could have "put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 434-35 (1995) (discussing materiality standard for *Brady/Bagley* claims and noting the standard was imported from *Strickland* prejudice analysis). Had an expert been utilized to expose Shircliff's testimony as at worst baseless and at best dubious, this possibility could have provided reasonable doubt leading to a different verdict at trial. *See Snowden v. Singletary*, 135 F.2d 732, 738-739 (11th Cir. 1988) (finding prejudice and granting 2254 relief based on improper expert testimony regarding a child's credibility "because the jury's opinion on the truthfulness of the children's stories went to the heart of the case."); *United States v. Whitted*, 11 F.3d 782, 787 (8th Cir. 1993) (inadmissible expert testimony vouching for child complainant satisfied substantial rights prong of plain error because "the case boiled down to a credibility contest" between child complainant and defendant).

At the very least, the foregoing cases provide empirical evidence that "reasonable jurists could debate whether . . .the petition should have been resolved in a different manner." *Slack*, 529 U.S. at 484. Petitioner's claim goes far beyond "the absence of frivolity" threshold necessary to obtain a COA. *Miller-El,* 537 U.S. at 337-38. A COA should have issued, and for these reasons Petitioner requests certiorari.

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CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant his petition for a writ of certiorari.

DATE: March 10, 2023

Respectfully Submitted,

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